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SELECTED TITLES

FROM

THE DIGEST.

DE CONDICTIONIBUS.

DIGEST XII. I. AND IV.—VII.
AND
DIGEST XIII. I.—III.

TRANSLATED AND ANNOTATED BY

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INTRODUCTION.

The definition of a **Condiction** given by Gaius stands thus: "appellantur in personam actiones, quibus dare fierive oportere intendimus, condictiones," and this is repeated, with the substitution of *facere* for *fieri*, by Justinian[1]. This dictum, on its face, might either imply that "condiction" and "personal action" are convertible terms, the distinguishing mark of each or either being that it is brought to enforce a claim, "dare fierive oportere;" or might imply that "condictions" are a particular subdivision or class of personal actions, viz. those wherein we enforce a claim "dare fierive oportere," other claims being possible, and enforceable by other forms of personal action. We find on investigation that the latter is the sense really intended[2]; for there are personal actions wherein we claim neither "dare" nor "fieri," delict-actions, for instance, where we plead "damnum decidere oportere adversarium;" whilst in personal actions on contract there are the two opposed subdivisions of *actiones stricti juris* and *actiones bonae fidei*, in the first of which the plaintiff's *intentio* (under the formulary system) ran "si paret N. Negidium centum (*vel* hominem) dare oportere," or "quidquid N. Negidium dare facere oportet," whilst in the second the qualifying words *ex bona fide* were added, "quidquid N. Negidium dare facere oportet *ex fide bona*." Hence, it is clear that by **Condictio** Gaius and Justinian intend a personal action that is (1) *stricti juris*, (2) on a contract or a quasi-contract; and

[1] Gai. *Comm.* 4. 5: Just. *Inst.* 4. 6. 15.

[2] Ulpian seems to say the contrary in D. 44. 7. 25, but the passage appears to have been mutilated by the compilers of the Digest, and does not harmonize with other statements of Ulpian.

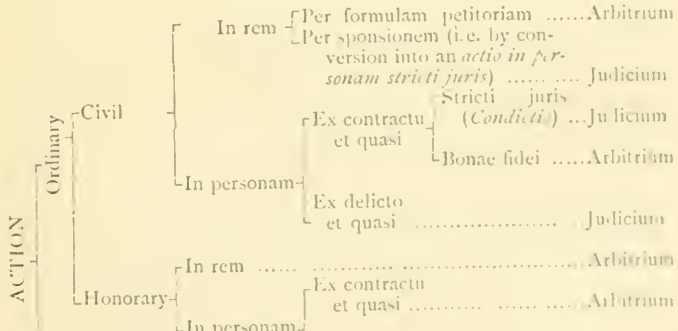
the proof, here barely indicated, is worked out with the utmost elaboration and detail by Savigny[1]. With his view accords the well-known passage where Justinian speaks of "actiones in personam, per quas intendit adversarium ei dare facere oportere *et aliis quibusdam modis*[2]," the first words, "dare facere oportere," referring to the *condictiones*, the final words to all other personal actions; viz. delict actions, with the *intentio* cast in the form "damnum decidere oportere," the honorary actions, which had an *intentio in factum concepta*, and were therefore without the words "dare facere oportere," and the other class of civil actions on contract, viz. the *bonae fidei actiones*, wherein the words "ex fide bona" were superadded to the "dare facere oportere[3]."

[1] *Röm. Recht.* App. XIV. §§ 25, 26.

[2] Just. *Inst.* 4. 6. 1. Gaius uses the word *praestare* to denote the same thing.

[3] Savigny also points out (*Röm. Recht.* § 218 and App. XIII, XIV), that although every action must in its essence be *stricti juris* or *bonae fidei*, yet the actual appellations are never used except in reference to personal actions on contract. All civil actions *in rem*, he says, are essentially *bonae fidei*, and so also are all honorary actions, whether *in rem* or *in personam;* civil actions on delict are as uniformly and essentially *stricti juris:* but actions on contract may be either the one or the other, prior to positive enactment on the subject; and, no doubt because of this inherent possibility, such actions are carefully classified in the Sources into the *stricti juris actiones*, more commonly styled *condictiones*, and the *bonae fidei actiones* (Just. *Inst.* 4. 6. *pr.*, with which compare D. 12. 3. 5. 4, *Inst.* 4. 6. 30). In the former variety of actions on contract, as in all other actions which are essentially *stricti juris*, the *judex*, under the formulary system, had a very limited power; in the other variety he had a larger discretion, to decide according to equity. This division of all actions, into those which are in their nature *stricti juris* and those which are in their nature *bonae fidei*, corresponds with Cicero's classification of *judicia* and *arbitria*, mentioned in *Pro Rosc. Com.* 5 and *De Off.* III. 15 and 17; for although, if the passage first cited stood alone, we might imagine that all actions on the Civil Law were termed *judicia*, and all actions on the Edict *arbitria*, yet, reading the three extracts together, we perceive that a *judicium* was a proceeding under some *lex* or *senatus consultum*, and therefore of necessity a Civil Suit, in which the *judex* was tied down to the letter of his formula; whereas an *arbitrium* was a proceeding which might be either on a *lex*, or a *senatusconsultum* or on the Edict, wherein the *judex*, called in such cases the *arbiter*, had greater latitude, his formula empowering him to decide *ex fide bona, ut inter bonos bene agier oportet, quod aequius melius* (Cic. *Top.* 17). This also appears from a passage in Seneca (*De Benef.* III. 7), where we are further informed that only citizens registered on the *album* could be *judices*, whilst any citizen whatever might be appointed *arbiter*. Hence, actions may be thus classified with reference to the extent of the power possessed by the *judex:*

Savigny has also fully discussed the origin and nature of *Condictiones*, and investigated the reason for their being *stricti juris*. He thinks that the Roman Law began, first of all, to protect property and rights inseparably connected with property, i.e. rights correlating to duties mainly negative, by allowing an *actio in rem;* and next proceeded to protect rights strikingly analogous to property rights, though originating from contract or quasi-contract. This it did by means of the Condiction: extending the same remedy afterwards to injuries to rights of a kind akin to property-rights, in cases of delict or mistake, and on other grounds of obligation. For, he says, when the Law recognizes contracts or quasi-contracts, from that moment it takes on itself the duty of protecting certain rights of each contractor against the other contractor; which rights usually correspond to positive duties; whereas proprietary rights generally correlate with negative duties. If, for example, in a contract or quasi-contract detention is parted with, but property retained, the Law can afford protection to some extent by simply allowing a real action, as when a lessee detains beyond the proper time land which has been let to him, and so violates his negative duty to abstain from interference with



another's property. But there are many possible and intended consequences, even of transactions with regard to property, which a real action cannot protect; in a lease, for example, the rent, if unpaid, must be recovered by some other process, for payment of rent is a positive duty, and incumbent on a definite person, not on the whole community. The Law, therefore, in this and all other cases where there is a manifest wrong for which the real action is useless, has in course of time granted a personal action, on the ground that *good faith* must be observed, or, in other words, that he who causes a lawful expectation shall not be allowed to disappoint it; for such an expectation is in some degree property, or is analogous to property. When property has been retained in a contract, and only detention parted with, we have a *partial remedy* in the real action; but this, as already noticed, is not always sufficient to give complete redress in case of wrong. There are, however, two other classes of cases, of even greater frequency, where a reasonable expectation is raised, and the real action is *entirely inapplicable*, viz. (1) when there is no giving up of any property or detention at all, (2) when both property and detention are parted with, but for a special purpose and not as a free gift. For the former the Law provides *bonae fidei* actions, for the latter *condictiones*. As to the *bonae fidei* actions[1]: —these have reference to a considerable number of possible dealings between man and man; for contracts in which neither detention nor property is parted with are obviously very numerous, and in many of them it may be disputable what is the precise expectation excited on either or on both sides. The

[1] It is Savigny's view, I think, that these actions were of later date than the condictions, for although he says (in § 220 *Röm. Recht.*) that condictions and *bonae fidei* actions grew up together; yet afterwards (in App. XIII. § 13) he seems to incline to the opinion, that since from very early times any agreement could be converted into a stipulation; in which case, as we shall presently see, it could be enforced by condiction; therefore the early Law of Rome refused a remedy to those who had neglected an obvious safeguard. Other writers assert, what no doubt is true, that reference to arbitration is a primitive custom antecedent to law, and argue hence that early law would adopt it as a reasonable mode of settling dispute; and this seems the more probable view to take.

Law can only lay down the simple rule, that each ought to do for the other what his words or actions would lead that other to expect, and this fidelity to engagements is the technical *Bona Fides* of Roman Law. Voet's description of *bona fides* is as follows: "in matters which lay an obligation on each party it is difficult, owing to the multiplicity of details, to state every point in the agreement, even when men of business-habits are the parties; it is therefore the rule that anything unexpressed in the agreement shall be supplied by the *judex* in accordance with fairness and equity, over and above what has been clearly defined[1]." Savigny's theory is very much to the same effect, for he lays down that in such instances each party may think his own view of *bona fides* the correct one, whilst admitting the possibility of error in his estimate: he is prepared therefore to submit the case to the decision of an umpire, and the Law provides the machinery for appointing one, who, from the nature of the case, can take into account all circumstances which on principles of good faith affect the rights and duties of the parties[2]." This then is the origin of *bonae fidei* actions, or, as Cicero styles them, *arbitria:* which are applicable (*inter alia*) to those cases of breach of contract (1) where neither detention nor property has been parted with, (2) where detention has been parted with and not property, but restitution of detention is not the whole of the remedy needful to be provided. These remarks upon *bonae fidei* actions being introduced only to clear the ground for an explanation of Condictions, we may dismiss the first-named class, after briefly noticing that, so far as procedure is concerned, they range themselves into two subdivisions, namely (1) the class wherein a principal obligation is imposed on each contractor, and consequently a direct action granted to each (*actiones utrimque directae*), and (2) the other class where there is only on one

[1] Voet *ad Pand.* 12. 1. § 6. See also D. 21. 1. 31. 20. "Ea enim quae sunt moris et consuetudinis in bonae fidei judiciis debent venire."

[2] See D. 21. 1. 31. 20. The *arbiter* can, for instance, give interest *ex mora* to the plaintiff; D. 22. 1. 32. 2: D. 16. 3. 24: and entertain exceptions not specially pleaded before *litis contestatio*, especially the *exceptio facti*, or *exceptio doli*; D. 18. 5. 3: D. 24. 3. 21, &c.

side a principal obligation, and on the other a consequential obligation, the first enforceable by *actio directa*, the second by *actio contraria*.

We pass now to the other case suggested above, where the Law ought to protect expectation, viz. when both property and detention have been parted with, but not to create a simple gift. Here one person divests himself of his proprietary rights in favour of another, on the understanding or in the expectation that this other shall in return give him a different thing, or perform for him some specific service[1]. It is clear that in this case again, a real action is useless, for the creditor, however much he may be deceived, has, of his own free will, parted with his property. And yet he is suffering a disappointment, strikingly analogous to that of a man whose property is kept from him; for his property, if he gave a *mutuum*, is diminished to the same extent exactly as the property of the other is increased; or if the *res credita* was that some different thing would be given or done in return for his alienation of property, the gain of the other party, if not what the donor loses in fact, is what he loses in expectation, and the two, if the contract was a reasonable one, may be presumed to be equivalent. Hence, he requires something akin to specific restitution, a return of equal value, at any rate; no circumstance requires to be considered beyond the fact of the agreement, and so the *judex* has no discretionary power, but must award either the whole of what is claimed or nothing at all. Hence arise the *condictiones*[2], or, at any rate, those afterwards designated *condictio certi*, or *condictio si certum petatur*, and *condictio causa data causa non secuta*. And it is most important to notice, that because one party alone can suffer disappointment of expectation, the other having received his inducement and expecting nothing further, therefore the *condictiones* are of necessity unilateral and *stricti juris*: which marks are characteristic not only of the two *condictiones* just named, but of all the other *condictiones* which

[1] D. 12. 1. 1. 1.

[2] Called also *actiones condictionis*, C. 4. 5. 1; C. 4. 6. 2; *condictitiae actiones*, *Inst.* 3. 14. 1, *Inst.* 4. 6. 24; D. 12. 1. 24: D. 12. 4. 7: C. 8. 55. 3, &c.

were afterwards brought into use, on states of fact analogous to those which gave rise to the condictions of earliest date.

But we cannot consider what these new condictions were, without first, or rather simultaneously, observing how the original condictions were extended in their application to new cases.

We have said that the earliest condictions were allowed when a man, not intending a gift, parted freely with property and detention; but it is highly probable that this statement ought to be still further restricted, and that we ought to believe that at first *mutuum* alone, in its strictest acceptation of a loan of *money*, was brought under the protection of the Condiction. The wording of the rubric of D. 12. 1, taken in connection with its contents, indicates this; for the heading of the title speaks generally of *res creditae*, and yet the excerpts deal, with very few exceptions, with loans of money. There are certainly passages here and there in the Title which indicate that condictions can be brought to enforce any lawful expectation, whether certain or uncertain, arising from the fact of another being enriched by the diminution of our property, but the bulk of it deals with loans in kind, and in fact almost entirely with loans of money[1]. Yet, as our confidence in another's promise to return money is in nature identical with our confidence in his promise to return *res fungibiles* of any description, and that again is closely connected with confidence in his promise to return a specific thing, or one thing as the equivalent for another, it would seem highly probable (1) that the *condictio* was at a very early date made applicable to *mutuum* in all its varieties, and (2) that the *condictio causa data causa non secuta*, or, as Savigny calls it, the *condictio ob causam datorum*, sprung into existence after no long interval, to remedy the wilful or accidental non-performance of a contract of exchange; its object being not to obtain what was promised,

[1] The words *creditor* and *creditum* clearly applied specially to cases where *money* was lent; as we may see from D. 50. 16. 10: "sed si non sit mutua pecunia, sed contractus, creditores accipiuntur." See also D. 50. 16. 11 and 12: D. 5. 1. 20: D. 44. 7. 5. 2.

but to recover money, other *res fungibiles*, or even a specific thing, given in consideration of the unfulfilled promise. Probably this latter *condictio* had no distinguishing appellation at first, and at any rate it was always regarded, in conformity with fact, as a mere branch of the old *condictio;* and hence we see what is meant in such passages as D. 12. 1. 1. 1, or D. 12. 1. 4. 1, where we read: "ideo sub hoc titulo Praetor et de commodato et de pignore edixit," and "res pignori data pecunia soluta condici potest." See also D. 16. 3. 13. 1.

Hence we start with two condictions:

(A). **Condictio**, simple and without epithet, for the recovery of a *mutuum*, or a specific thing bailed;

(B). **Condictio causa data causa non secuta**, for the recovery of what we gave, when the other party fails to give us a different thing which he promised in exchange.

But, the principle on which these are based being not so much that there has been a promise, as that our patrimony has been unfairly diminished to the increase of the patrimony of another person, we find that the scope of the original condictions was extended, and that new condictions were introduced in certain analogous cases.

(C). The **condictio** simple was extended to cases where detention had been delivered without property, and the bailee wrongfully assumed property, by consumption or sale of the goods in his charge[1]: for it was contrary to natural equity that the bad faith of the debtor should put him in a better position than the confidence of the creditor would have done. Savigny says "the bailee here destroys the bailor's *vindicatio*, and so the bailor receives a *condictio* instead[2]." This conversion of detention into property invariably gives rise to a *condictio*, and

[1] This qualification is necessary, for if they could be identified there was a *vindicatio*.

[2] *Röm. Recht.* App. XIV. § 6. See D. 12. 1. 13. 1; D. 16. 3. 13. 1. In D. 42. 5. 24. 2 we have the maxim; "aliud est enim credere, aliud deponere," which clearly signifies that a *depositum* does not of itself give rise to a condiction, but to a vindication; fraud, however, on the part of the *depositarius* may convert the *depositum* into a *creditum*, and then there is a condiction.

therefore may occur in the cases of *depositum*, *commodatum*, *pignus*, *mandatum*, *societas*, *tutela*, *locatio*, or *negotia gesta*[1].

(D). A **condictio** proper, on the same ground of one person being unfairly enriched at the expense of another, was also granted in the case where a *bona fide* detainor of my property had consumed it, or alienated it, and was profited thereby; although equity required that in this case, where both parties were innocent, the condiction should not be for the amount of my loss, but for the amount of the other's profit.

(E). The **condictio** proper was also extended (but for a totally different reason, viz. the will of the parties, without any reference to one gaining through the other's loss) to cases where engagements of a definite character, but having in themselves no guarantee beyond good faith, were put by consent of the parties under the sanction of some form to which the Law attached a binding force, viz. *nexi obligatio* or *expensilatio* in olden times, *stipulatio* throughout the classic period of Roman Law, and *litterarum obligatio* in the days of Justinian.

(F). For a connected reason, the **condictio** proper became the process for recovery of a legacy *per damnationem*, and therefore after Nero's S. C. (Gai. *Comm.* 2. 197) for the recovery of any legacy; not because the legatee had lost property and the heir profited thereby; for the legatee had never had either detention or property of that which was bequeathed to him; but because in ancient times testaments were celebrated *per nexum*, and therefore the heir was bound by a formality to which, as *familiae emptor*, he had given personal consent. This obligation still remained, because of its intrinsic equity, when the *familiae emptor* was no longer the *heres*, and when *nexum* was no longer part of the formalities of making a testament.

(G). A condiction was also granted when detention and property had been freely parted with, but rather through mistake or the wrongful dealing of another, than through confidence, and so arose the **condictiones indebiti, sine causa,** and **ob turpem vel injustam causam,** on which we shall have

[1] See D. 12. 2. 28. 4: D. 17. 2. 45—47: D. 27. 3. 5: D. 44. 2. 5: D. 44. 7. 34. 2.

more to say hereafter; but which all agree in this, that the *causa*, or ground, is a mistake of some sort, i.e. either of fact or law. These condictions could be brought for recovering the exercise of *rights*, although the Condiction proper could only be brought for the possession of property: and the reason is obvious, the simple Condiction is for what is lent; and property alone, not rights, can be the matter of a loan; whereas rights, equally with the possession of property, can be parted with in mistake.

So far, all the condictions have arisen one out of the other, through a simple connection of ideas; but two still remain which are anomalous. These are the *condictio furtiva* and the *condictio ex lege*.

(H). The **condictio furtiva**, more properly designated **condictio ex causa furtiva**, was introduced "odio furum" (Gai. 4. 4), in derogation of strict principle. A condiction is properly an action to supply the want of a vindication, which is required by justice, but impossible in fact. If, then, a thief is in possession of a stolen article, seeing that vindication is possible, there ought logically to be no condiction. If the article has been alienated or consumed, a *condictio sine causa* is possible. But it is so difficult to know whether a stolen article has or has not been alienated or consumed, that in the particularly heinous case of theft a *condictio furtiva* is allowed, without regard to the question of a *vindicatio* being possible or impossible: and this *condictio* can be brought even against the wrongful possessors of immoveable property, which, being by nature indestructible, is always the proper subject for a vindication. D. 47. 8. 2. 26: D. 12. 3. 1. 1.

It is clear that this action arises not on the delict (the foundation of the *actio furti*), but on a quasi-contract inseparable from a delict, viz. on the duty to restore, which is incumbent on any man who wrongfully enriches himself at another's expense.

(I.) Lastly, another anomalous condiction, the **condictio ex lege**, was allowed by a standing rule of Roman Jurisprudence, when a *nova lex* (which some understand to mean a *lex* passed

at a later date than the XII. Tables, but Savigny, more reasonably, to mean one passed after the Lex Aebutia had established the formulary system) provided a remedy, but said nothing about the procedure to enforce it. The remedy then was a *condictio ex lege;* a condiction, that is to say, and not a *bona fide* action; and a condiction falling under none of the classes hitherto mentioned, but bearing the name of the *lex* which it is employed to enforce[1].

To sum up our results:—the proper foundations of a condiction are seen to be

(1) the benefit of one man's property at the expense of that of another without lawful cause: and

(2) the inapplicability of the remedy by *vindicatio.*

The benefit of one man's property at the expense of the other's may either arise from

(*a*) express engagement unfulfilled,

(i) the engagement being in consideration of an actual benefit (A, B, above);

(ii) the engagement being upon the fiction of a benefit (E, above);

(*b*) fictitious engagement, coupled with actual benefit (F, above);

(*c*) error, fraud or violence (G, above);

(*d*) consumption or alienation,

(i) following on lawful detention, i.e. detention taken with the consent of the owner or through error, the consumption or alienation being either erroneous or fraudulent (C, D, above);

(ii) following on unlawful detention, i.e. detention taken through fraud or violence, the consumption or alienation therefore being also fraudulent (G, above).

The improper foundations of condiction are

(*e*) theft, i.e. theft without consumption (H, above);

[1] If a *lex* provided neither procedure nor remedy, it was *imperfecta*, i.e. practically a dead letter. Hence Roman Law and English herein differ. See Austin's *Jurisp.* Lect. 1. p. 101, Campbell's Edition.

(*f*) non-provision of procedure in a *nova lex*, a remedy or penalty being, however, provided therein (I, above).

But besides the classification based on the grounds for which the condiction was given, there is another disparate classification to be found in the Digest, having reference to the character of the claim, whether (1) for a definite sum of money, (2) for *res fungibiles* of definite amount other than money, or for a specific thing, (3) for an indefinite sum of money, to be settled by the *judex*.

Hence we have

(1) *condictio certi*, which is really equivalent to *condictio certae pecuniae;*

(2) *condictio triticaria*, in the strict sense, for anything ascertained;

(3) *condictio incerti*, or *condictio triticaria* in an extended and improper sense, for what is unascertained till settled by the *judex*.

These I repeat are disparate divisions, having no connexion with those above tabulated.

A *condictio indebiti*, for instance, would be a *condictio certi*, if it was brought to recover a definite sum of money; but would be a *condictio triticaria*, if brought for so many *modii* of wheat, or for the value of so many *modii* of wheat, or for a specific slave or field, or for the value of a specific slave or field, delivered in mistake: so also, if a condiction was brought upon a stipulation, it would be a *condictio certi*, if the stipulation had been for 100 *aurei*, but would be a *condictio triticaria* or *incerti*, more generally styled an *actio ex stipulatu*, if brought on a stipulation for the slave Stichus, or for 100 *modii* of wheat, or for compensation for breach of contract to build a wall. Probably this division of stipulations was gradually introduced: the distinction between *condictio pecuniaria*, afterwards known as *condictio certi*, and *condictio triticaria* being presumably antecedent to the introduction of *formulae*, and dating from the time when the Lex Calpurnia allowed the "legis actio per condictionem *de omni certa re*," in addition to the other "legis actio per condictionem *de certa pecunia*" introduced by the Lex Silia

(see Gai. *Comm.* 4. 19). But as all condictions (see A and B, above) were originally for something definite, it could not have been previous to the introduction of condictions upon a stipulation (E above) and the *condictiones sine causa*, *indebiti*, and *ob turpem vel injustam causam*, which were applicable to uncertain things or rights, that the epithet *certi* could with any propriety have been attached to a special kind of *condictio:* and when the *condictio certi* became a definite and acknowledged variety, it is remarkable that it was only used to designate the condiction for an ascertained sum of money: *condictio triticaria* being the condiction applicable to any other matter of claim. certain or uncertain, and *condictio incerti*, a subdivision of *condictio triticaria*. D. 13. 3. 1.

Thus, tabulating according to the nature of the remedy sought, we have three varieties of condiction employed in the time of Justinian, and, in fact, throughout the classical period of Roman jurisprudence.

(*aa*) The **condictio certi**, for a definite sum of money: having therefore in the formulary times, a *certa intentio* and *certa condemnatio;* and in general not having a *demonstratio*, unless, perhaps, when brought *ex causa indebiti*, *ex causa furtiva*, &c.; though possibly in cases of stipulation, expensilation or *nexum*, the ground of action was expressed in the *intentio*. Hence the *formula* of the *condictio certi* would run:

i. Si paret HS. C dare oportere A° A° N^m N^m, judex, HS. C A° A° N^m N^m condemna.

ii. Si paret ex stipulatu HS. C dare oportere A° A° N^m N^m, judex, HS. C A° A° N^m N^m condemna.

(*bb*) The **condictio triticaria**, properly so called, for a certain thing, other than money, whether certain *in specie*, or *in genere;* having a *certa intentio*, but an *incerta condemnatio*.

Hence the *formula* of this proper *condictio triticaria* would run:

i. Si paret tritici optimi modios C A° A° N^m N^m dare oportere, quanti ea res erit tantam pecuniam A° A° N^m N^m, judex, condemna.

ii. Si paret Stichum hominem (fundum Cornelianum) A° A° N^m N^m dare oportere, quanti ea res erit tantam pecuniam A° A° N^m N^m, judex, condemna.

(*cc*) The **condictio certi**, or *condictio triticaria* improperly so called, for an uncertain thing, generally having an *incerta intentio*, but sometimes a *certa intentio*, but invariably a *demonstratio* and an *incerta condemnatio*.

Hence the formula of this *condictio incerti* would run :

i. Quod inter A^m A^m et N^m N^m illud gestum est, quidquid ob eam rem A° A° N^m N^m dare facere oportet, tantam pecuniam A° A° N^m N^m, judex, condemna.

ii. Quod inter A^m A^m et N^m N^m illud gestum est, si paret ob eam rem usum fructum fundi Corneliani A° A° N^m N^m dare oportere, quidquid ob eam rem A° A° N^m N^m dare facere oportet, tantam pecuniam A° A° N^m N^m, judex, condemna.

If the cause of action arose upon a stipulation for something uncertain ; or certain, but not money ; possibly this fact was specially noted either in the *demonstratio* or *intentio ;* but, at any rate, the action was then styled **actio ex stipulatu**, and not *condictio triticaria* or *condictio incerti ;* and yet a condiction was styled *condictio certi*, as already stated, even though upon a stipulation, if for a definite sum of money.

In a **condictio certi** the plaintiff could always demand from his opponent a *sponsio tertiae partis*, engaging himself in a *restipulatio tertiae partis*, and this was obviously an important safeguard against vexatious claims and vexatious defences : for the amount of the sponsion had to be paid in addition to the sum of money claimed, if the defendant proved unsuccessful ; whilst the amount of the restipulation was forfeited by a defeated plaintiff.

In a **condictio triticaria** proper, there was no sponsion or restipulation, but the "quanti ea res erit" which the *judex* was directed to award was not the market value of the thing claimed, as in the *condictio certi*, but the value it had for the plaintiff.

In a **condictio incerti**, the improper *condictio triticaria*, the *judex* still more certainly could award the value of the plaintiff's

loss or inconvenience, for, as the object of the action was an indeterminate sum, there was no market value to consider.

I now proceed to analyze the contents of the Titles of the Digest which treat of Condictions.

The title 12. 1 may be regarded as treating, *firstly*, of the general rules applicable to every condiction wherein a definite claim is made, "de rebus creditis si certum petatur;" *secondly* of the *condictio certi*, technically and arbitrarily so designated, which is directed to the recovery of a definite sum of money.

Hence we may tabulate its contents as follows:

I. A *condictio certi* or *triticaria* proper, is founded on a *creditum certum*.

1. Therefore, it arises only when

(α) There is a transfer of property from ourselves to another, — 12. 1. 9. 3—7: 12. 1. 32:

whether we transfer personally or by an agent, and — 12. 1. 9. 8:

whether the other party receives *suo nomine* or *alieno nomine:* — 12. 1. 9. 2: 12. 1. 27: 12. 1. 29:

or

(β) We do some act, or some act is done to us, which we intend, or which the law presumes, to be equivalent to delivery of property, as stipulation, &c., — 12. 1. 2. 5: 12. 1. 9. 1, 2 and 9: 12. 1. 42: 12. 4. 3. 4:

or

(γ) there is, at any rate, a transfer of *possesssio ad usucapionem*. — 12. 1. 23: 12. 1. 31. 1.

2. There must also be an expectation of a return, founded on a promise or the legal presumption of a promise, which expectation, when raised, must be certain, present and absolute: — 12. 1. 6: 12. 1. 9. *pr.*: 12. 1. 19. *pr.*: 12. 1. 36:

although whether an expectation is to be raised or not may be conditional. — 12. 1. 7: 12. 1. 8.

II. The *condictio certi* is founded on a loan of money, which is a special kind of *mutuum*, or on a stipulation for a certain sum of money. It is

important therefore to distinguish *mutuum* from *creditum:* that being settled, the further distinction between a loan of money and a loan of other fungible articles is apparent.

Now the differences between *mutuum* and *creditum* are these.

1. In *mutuum* the return is to be made *in genere*, not *in specie*, and not of one thing for another; — 12. 1. 2. *pr.* 1—3: 12. 1. 3: 12. 1. 13. 2: 12. 1. 22:

2. In *mutuum* the creditor must part with property, and cannot create the obligation by such fictions as those in I. (β) above. — 12. 1. 2. 2—4:

The *condictio certi* therefore arises

1. On voluntary loan of money:

(α) When possession and property in money have been delivered, actually, or *brevi manu* or *longa manu:* — 12. 1. 9. 9: 12. 1. 10: 12. 1. 11. *pr.* and 1: 12. 1. 15: 12. 1. 30:

(β) When the person who delivered possession and property was owner of the money delivered, or was acting with the consent of the owner, either express or implied, as in the case of a slave administrator: — 12. 1. 16: 12. 1. 11. 2: 12. 1. 41:

(γ) When there was a present intention on both sides to create a *mutuum;* — 12. 1. 18: 12. 1. 19. *pr.*:

whether the donor's intent was voluntary or in fulfilment of a prior obligation; — 12. 1. 20:

and even if the receiver's intent was to take the *mutuum* from another person: — 12. 1. 32:

2. On the fiction of *mutuum*, when a definite sum of money is the matter of stipulation or other formal contract, — 12. 1. 24:

but the stipulation must be certain and unconditional: — 12. 1. 36: 12. 1. 37: 12. 1. 38: 12. 1. 39:

3. On involuntary *mutuum*, which arises when goods improperly received, but received in good faith, have been consumed to the profit of the receiver.

Hence, consumption cures

(α)	Defect of delivery of possession,	12. 1. 4 : 12. 1. 18. 1 : 12. 1. 23 :
(β)	Defect of ownership in the donor,	12. 1. 11. 2 : 12. 1. 13 : 12. 1. 14 : 12. 1. 19. 1 :
(γ)	Defect of intention on the part of the donor.	12. 1. 12 : 12. 1. 18. *pr.* : 12. 1. 19. 1.

The *condictio certi* must be brought by the person on whose account the money has been paid : 12. 1. 26 :

hence, a *filiusfamilias* cannot bring it, but has another remedy. 12. 1. 17.

There are, however, persons who may not lend, and therefore cannot have the condiction. 12. 1. 33 : 12. 1. 34.

The *condictio* is for the money, together with its accruals after *litis contestatio.* 12. 1. 31. *pr.*

It must be brought against the actual receiver, or against the person for whom an agent receives ; and can be brought, even if there is a collateral security. 12. 1. 27 : 12. 1. 29. 12. 1. 28.

If a tender of part be made by the receiver, it must be accepted, and the *condictio* brought for the balance. 12. 1. 21.

The title 12. 4 treats of the condiction designated

Condictio causa data causa non secuta.

This condiction can be employed in the case where he who has given money or any other article by way of exchange, wishes to have again the equivalent in value of what he parted with, or sometimes to have the actual thing itself. Hence, clearly, the condiction only applies to certain varieties of exchange, namely those comprehended under the heads *do ut des*,

do ut facias and *do ne facias;* for since there is no possible reversal of acts, although there is a possible recovery of money or goods, the condiction is useless in an exchange *facio ut des*, *facio ut facias* or *facio ne facias.* In these last-named cases the *actio in factum præscriptis verbis* is the appropriate remedy. See D. 19. 5. 5. 3 : 19. 5. 25.

This condiction *causa data causa non secuta*, if brought to recover money, may be considered as an instance of *condictio certi*, if to recover any other thing, fungible or specific, as an instance of *condictio triticaria.* It is, however, usually employed to recover money, and some hold, though it is difficult to follow their reasoning, that the appropriate condiction to recover any thing other than money, *re non secuta*, is not this condiction, but a simple *condictio triticaria.* It may here be observed in connection with the phrase just used, *re non secuta*, that the condiction ought in strictness to be named *condictio causa data* re *non secuta ;* for *causa* in its more accurate use is employed to denote what is past or present, *res* what is future, as Paulus and Pomponius tell us in D. 12. 5. 1, 12. 6. 52 and 12. 6. 65; so that *causa* very much resembles the "consideration executed" of English Law, *res* the "consideration executory."

The condiction we are here discussing clearly does not arise, strictly speaking, *upon the contract* of exchange, but *upon a quasi-contract* inseparable from the contract: for the action on the contract would, of course, be for specific performance, whereas the action on the quasi-contract is for restitution of what was given, supposing the fulfilment of the contract to become impossible, or the person who has parted with property to change his mind before his doing so will cause detriment to the other contractor.

The general principle on which the condiction is allowed is therefore analogous to that supporting the *condictio certi:* for in the latter the suit can be brought, because an expectation founded on a promise is disappointed ; here because, though no promise is broken, yet the donor has a right to expect the receiver to act as if he had promised to restore in case of default, error or mistake.

The contents of D. 12. 4 may be thus tabulated:

III.	The *condictio causa data causa non secuta* arises	
(α)	When the plaintiff has parted with property, or given an acceptilation:	12. 4. 1: 12. 4. 4: 12. 4. 10:
(β)	When he expected in return some gift, or act,	12. 4. 16: 12. 4. 1. *pr.*: 12. 4. 3. 2 and 3:
	or forbearance:	12. 4. 1. *pr.*: 12. 4. 3. *pr.* and 1:
(γ)	When the expectation has been disappointed by the other party wilfully or carelessly;	12. 4. 3. 1—4: 12. 4. 5. 4: 12. 4. 9. 1: 12. 4. 11: 12. 4. 14: 12. 4. 15: 12. 4. 16: 12. 6. 65. 4:
	or without the fault (though possibly by the act) of the first party becomes impossible to be fulfilled;	12. 4. 1. 1: 12. 4. 2: 12. 4. 6: 12. 4. 8: 12. 4. 9. *pr.*: 12. 4. 13: 12. 4. 16: 12. 6. 65. 3:
	or was impossible from the outset;	12. 4. 3. 5—8:
	or the donor has changed his mind, *re infecta*,	12. 4. 3. 2 and 3: 12. 4. 5. *pr.* and 1—3:
	and gives notice thereof;	12. 4. 5. 1 and 2:
	provided also, in case of such change of mind, he saves the other party harmless.	12. 4. 5. *pr.* and 2—4.
	The *condictio causa data causa non secuta* must be brought by the person on whose account the payment or transfer was made.	12. 4. 6: 12. 4. 7. *pr.*: 12. 4. 9. *pr.*:
	It is usually brought for money;	12. 4. 5. 1: 12. 4. 11:

but may be brought to recover a specific thing,	12. 4. 5. 1—3: 12. 4. 7. 1:
or to rescind an act;	12. 4. 4: 12. 4. 10:
and if it is brought for a specific thing, the fruits also are recoverable.	12. 4. 7. 1: 12. 4. 12.

In D. 12. 5 we have a discussion of the

Condictio ob turpem vel injustam causam.

This condiction applies when a person who has given money to another for some consideration which is disgraceful to the receiver, but not to himself, wishes to recover what he has given. Here the disappointment of expectation generally takes the form that a man, who has by law a right to something, is subjected to extortion and compelled to pay money for that which he was justified in expecting to receive gratuitously: or that he has to pay money to induce another to do his lawful duty, which he might have been expected to do without any inducement beyond his respect for the law. The disappointment, for which the condiction provides, being thus understood, there can clearly be recovery, whether the purpose for which the money was given has or has not been carried into effect; and herein the *condictio* differs from that *causa data causa non secuta;* which, as the consideration was a proper one, can only succeed when the consideration has failed. D. 12. 5. 1.

IV. The *condictio ob turpem vel injustam causam* arises

(α)	When the plaintiff has parted with property for a purpose disgraceful to the receiver;	12. 5. 1: 12. 5. 2. *pr.* and 1: 12. 5. 4. 2: 12. 5. 6:
	but not disgraceful to himself;	12. 5. 2. 2: 12. 5. 3: 12. 5. 4. 1 and 2:
	or when the transfer is the direct or indirect result of violence.	12. 5. 7.
(β)	It succeeds whether the purpose has been effected or not.	12. 5. 1. 2: 12. 5. 5: 12. 5. 9: 12. 6. 36.

(7) If the purpose of the transfer is disgraceful to both parties, the condiction cannot be brought.	12. 5. 2. 2 : 12. 5. 3 : 12. 5. 4 : 12. 5. 8.
It is brought to recover what was given.	12. 5. 1. 2 : 12. 5. 5 : 12. 5. 6.

In D. 12. 6 is discussed the

Condictio indebiti.

This condiction arises on a quasi-contract, and its object is the recovery of that which, through the giver's ignorance, has been parted with, although due neither legally nor naturally. The *condictio indebiti* can therefore be brought not merely for the recovery of money or goods, but also for the recovery of possession and for the rescission of acts; and as the two last-named objects may not be attainable specifically, or not attainable in such wise as to compensate the plaintiff, who consequently desires a money equivalent to be estimated by the *judex*, the *condictio indebiti* may not only be a variety of *condictio certi* or *triticaria*, in the proper sense, but may also take the form of *condictio incerti*, as we see from D. 12. 6. 22. 1 : D. 12. 6. 40. 1.

The condiction being grounded on the *ignorance* of the giver, we have to consider whether the ignorance intended is of fact or of law. Ignorance of fact is undoubtedly a ground for the condiction; but opinions differ as to ignorance of law. Voet quotes C. 1. 18. 10: "cum quis jus ignorans indebitam pecuniam solvit, cessat repetitio; per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est." But Huber holds that this apparently conclusive dictum is to be read in connection with D. 22. 6. 7: "juris ignorantia non prodest acquirere volentibus, suum vero petentibus:" and he thinks that a man who brings a *condictio indebiti* may be considered *suum petere*. He allows that it is not so *stricto jure*, as a condiction is never, or very seldom, brought to preserve property which is wrongfully possessed, but rather to obtain the equivalent of property which has been without just cause alienated[1];

[1] Here Huber understates his case, for a *condictio triticaria* is sometimes to recover a specific article.

and yet he maintains that although the condiction is technically directed to the recovery of *debitum* rather than *suum*, still the Roman Jurists do not pay attention to this technicality, but usually speak of *debitum* as a variety of *suum*. We have, for instance, he says, in D. 42. 8. 6. 6: "eum qui suum recipiat...hoc est, eum qui quod sibi debetur receperat;" and in D. 44. 4. 5. 5: "si eum qui volebat mihi donare supra legitimum modum delegavero creditori meo, non potest adversus petentem uti exceptione, quoniam creditor suum petit." The truth seems to lie half-way between the view of Huber and that of Voet: for D. 12. 6. 26. 12 and D. 12. 6. 64 seem clearly to refer to an error in law, and the same appears probable in the case suggested in D. 12. 6. 59 and in other excerpts: by comparison whereof the result is arrived at that

(1) if payment be made in ignorance of a legal rule accordant with natural equity, there is recovery:

(2) if payment be made in ignorance of a legal rule in conflict with natural equity, there is no recovery.

The rules of D. 12. 1 may be thus tabulated:

The *Condictio indebiti* arises when the plaintiff's property has come into the defendant's possession without being due to him for any reason, civil or natural.

I. Hence, a payment is not *indebitum*, if due merely naturally: 12. 6. 8: 12. 6. 9: 12. 6. 11: 12. 6. 13: 12. 6. 14: 12. 6. 26. 12: 12. 6. 28: 12. 6. 32. 2: 12. 6. 38. *pr.*, 1 and 2: 12. 6. 51: 12. 6. 60. *pr.*: 12. 6. 64: 12. 6. 67. *pr.* and 4:

and, *a fortiori*, it is not *indebitum*, if due civilly as well ; — 12. 6. 30 : 12. 6. 35 : 12. 6. 36 : 12. 6. 42 : 12. 6. 59 :

even though the payment may work no acquittance. — 12. 6. 63.

As a civil debt is never *indebitum*, there is, in particular, no *condictio indebiti* when a payment is made

(α) *ex judicato :* — 12. 6. 60. *pr.* : see also C. 4. 5. 1 and D. 17. 1. 29. 5 :

(β) *ex compromisso :* — 12. 6. 26. 10 :

(γ) *ex transactione :* — 12. 6. 23. *pr.* and 1 : 12. 6. 65. 1 :

unless the *transactio* is in any special instance invalid or forbidden by law. — 12. 6. 23. *pr.* and 1—4 : 12. 6. 65. 1 : 12. 6. 67. 3.

II. A payment is *indebitum*, and therefore the appropriate matter for a *condictio indebiti*,

(α) When not due at all naturally or civilly;

(*a*) Because paid for a cause which never in fact existed ; — 12. 6. 2. 1 : 12. 6. 22. *pr.* : 12. 6. 23. *pr.* : 12. 6. 26. 2 and 10 : 12. 6. 34 : 12. 6. 37 : 12. 6. 38. 3 : 12. 6. 41 : 12. 6. 58 : 12. 6. 67. *pr.* :

(*b*) or which once existed, but ceased to exist before the payment ; — 12. 6. 25 : 12. 6. 54 : 12. 6. 59 :

(*e*) or which existed only naturally, and has been destroyed naturally;	12. 6. 38. *pr.*, 1 and 2:
(*d*) Because paid to a wrong person;	12. 6. 22. *pr.*: 12. 6. 26. 11: 12. 6. 65. 9:
but payment to an ostensible owner is not payment to a wrong person;	12. 6. 55:
(*e*) Because paid by a wrong person;	12. 6. 19. 1: 12. 6. 65. 9:
but it is not *indebitum*, if paid by a wrong person on behalf of the right person;	12. 6. 44:
(*f*) Because one thing is paid instead of another;	12. 6. 19. 3: 12. 6. 26. 4 and 14: 12. 6. 32. *pr.* and 3:
(*g*) Because paid in excess of what is really due;	12. 6. 19. 4: 12. 6. 20: 12. 6. 26. 5, 6 and 13: 12. 6. 39: 12. 6. 45:
the *condictio indebiti* in this case sometimes taking the form of a *condictio incerti*;	12. 6. 22. 1: 12. 6. 40. 1:
(β) When *not yet* due naturally or civilly, because dependent on an unfulfilled condition which may never vest;	12. 6. 16: 12. 6. 18: 12. 6. 48: 12. 6. 56:
hence, a payment due at an uncertain date is *indebitum*, but not a payment due at a date certain to arrive, or upon a condition certain to come to pass;	12. 6. 10: 12. 6. 17: 12. 6. 18: 12. 6. 56: 12. 6. 60. 1: 12. 6. 65. 2:
(γ) When not due naturally, although due civilly; i. e. when payment might have been evaded by the use of an *exceptio perpetua*;	12. 6. 24: 12. 6. 26. 3 and 7: 12. 6. 32. 1: 12. 6. 40. 2: 12. 6. 43: 12. 6. 56:
provided only the exception is not in conflict with natural equity;	12. 6. 9: 12. 6. 28: 12. 6. 33:

and provided the exception is granted for the benefit of the debtor, rather than for the prejudice of the creditor; — 12. 6. 19. *pr.*: 12. 6. 40. *pr.*:

(δ) When due naturally, but for a cause reprobated by some special rule of the civil law; — 12. 6. 26. *pr.* and 1:

provided the special rule of law is for the protection of the debtor, rather than for the prejudice of the creditor. — 12. 6. 26. 9.

III. The *condictio indebiti* can only be brought when the payment has been made in ignorance that it was not due: — 12. 6. 1. 1: 12. 6. 24: 12. 6. 26. 2, 3, 7 and 8: 12. 6. 50: 12. 6. 62:

but ignorance is not a ground for the condiction, when repayment would cause loss to an innocent person. — 12. 4. 9. 1.

In the case of persons under disqualification ignorance is presumed. — 12. 6. 29.

When the payment was made in doubt, with a proviso for return if it proved *indebitum*, the *condictio certi*, rather than the *condictio indebiti*, ought to be employed. — 12. 6. 2. *pr.*

The *condictio indebiti* is to be brought by the person on whose account the payment has been made; — 12. 6. 6. *pr.*: 12. 6. 47: 12. 6. 53: 12. 6. 57: 12. 6. 67. 2:

or by his heir; — 12. 6. 12:

and not of necessity by the payer; — 12. 6. 6. 3: 12. 6. 36: 12. 6. 44: 12. 6. 46: 12. 6. 47:

although the latter has sometimes an *utilis condictio indebiti*. — 12. 6. 6. *pr.*: 12. 6. 53: 12. 6. 67. 1.

Sometimes this *utilis condictio* can be brought by a person whose interest is affected, although — 12. 6. 2. 1: 12. 6. 3:

payment has not been made by him nor on his account.	12. 6. 4 : 12. 6. 5 : 12. 6. 61.
The *condictio indebiti* is brought against the receiver of the payment, whether he is benefited by it or not ;	12. 6. 6. 1 and 2 : 12. 6. 49 :
but that person is considered to be the receiver who directs payment to be made to his agent, or ratifies receipt by his *negotiorum gestor*.	12. 4. 14 : 12. 6. 6. 2 : 12. 6. 57. 1.
The *condictio indebiti* may be either for the thing itself, or to receive a *cautio*, or to rescind one.	12. 6. 15. 1 : 12. 6. 31 : 12. 6. 39.
The fruits of the thing are included, necessary expenses are deducted ;	12. 6. 15. *pr.* : 12. 6. 26. 12 : 12. 6. 65. 5 :
but, because a *condictio* is *stricti juris*, interest is not included.	C. 4. 5. 1.
The condiction can be brought anywhere, even if the payer thought himself bound to pay in a certain place.	12. 6. 27.

In D. 12. 7 we have a few excerpts dealing with the

Condictio sine causa.

The *condictio sine causa* is brought to recover a thing, or the value of a thing, which is detained without lawful cause. Hence this condiction may be either *general*, and concurrent with the *condictio indebiti*, *condictio causa data causa non secuta*, *condictio ob turpem vel injustam causam*, &c. ; or may be *special*, and employed in cases where no other condiction will obtain the remedy required, the cancelling, for instance, of an obligation, or the destruction of a document which is evidence of a contract that has been fulfilled. The *special* condiction *sine causa* will also be of service where an article has been delivered for a cause originally valid, but through some supervening circumstance made invalid.

Hence the contents of D. 12. 7 may be thus tabulated :

1. The general *condictio sine causa* is concurrent with the *condictio indebiti* :	12. 7. 1. *pr.* :

or the *condictio causa data causa non secuta:*	12. 7. 1. 1 and 2: 12. 7. 4: 12. 7. 5:
or the *condictio ob turpem vel injustam causam.*	12. 7. 1. 3.
2. The special *condictio sine causa* is used	
to procure the cancelling of an agreement or document,	12. 6. 31: 12. 7. 1. *fr.*: 12. 7. 3:
or to recover payment made for a cause originally valid, but subsequently invalid.	12. 7. 1. 2 and 3: 12. 7. 2: 12. 7. 4. See also 12. 1. 31. 1: 12. 1. 32.
There is a doubt whether even this condiction can be employed when the relation between the parties is founded neither on contract nor quasi-contract.	12. 6. 33.

As to the *condictio furtiva*, which is treated of in D. 13. 1, remarks will be found above under the heading (H) p. xiv.; and it needs only to be added here that whereas all other *condictiones* are brought on the ground that an owner has been deprived of property, of which he ought not to have been deprived, and that a *vindicatio* is inapplicable; this condiction is allowed, *odio furum*, Just. *Inst.* 4. 6. 14, even when a vindication is possible, and is brought by a person who is still owner of that for which he sues.

The contents of D. 13. 1 may be thus tabulated.

The *condictio furtiva* arises when a theft has been committed.	
It is brought, in its proper form, only by him who was owner of the stolen thing at the time it was stolen;	13. 1. 1: 13. 1. 12. *fr.*: 13. 1. 18: 13. 3. 1. 1: 13. 3. 2:
or by the general successor of that owner; not by a special successor;	13. 1. 11: 13. 1. 14. *fr.* and 1:

but not by an owner, who, after the theft, has voluntarily parted with ownership.	13. 1. 10. 2 and 3 : 13. 1. 12. 1.
But a *condictio furtiva incerti* can be brought by a person robbed merely of possession.	13. 1. 12. 2.
The *condictio furtiva* is brought against the thief (or *bonorum raptor*) or his heir ;	13. 1. 2 : 13. 1. 5 : 13. 1. 7. 2 : 13. 1. 9 : 13. 1. 10 *pr.* and 1 :
but cannot be brought against a mere accomplice (although the *actio furti* can).	13. 1. 6.
It can be brought against one who has *potestas* over a thief, to the amount of his profit ;	13. 1. 4 : 13. 1. 5 : 13. 1. 19 :
but not against a slave himself, if subsequently manumitted (though the *actio furti* can).	13. 1. 15.
It is brought for the thing, if still existent,	13. 1. 8. *pr.* : 13. 1. 14. 2 :
or for any part of it existent ;	13. 1. 14. 2 and 3 :
or, if it is non-existent, for its best value since the time of theft, however its value may have been diminished or augmented ;	13. 1. 7. 2 : 13. 1. 8 *pr.* and 1 : 13. 1. 13 : 13. 1. 16 : 13. 1. 20 :
but not if the owner has recovered the article, had it tendered to him, or compromised for it.	13. 1. 8. *pr.* : 13. 1. 10. *pr.* : 13. 1. 17.
Fruits and profits are included in the value.	13. 1. 3 : 13. 1. 8. 2.
The *condictio furtiva* can be brought, even though the *actio furti* has been compromised.	13. 1. 7. *pr.* and 1.

The *condictio ex lege* and the *condictio triticaria* are treated very briefly in D. 13. 2 and D. 13. 3 : and the doctrines contained in the few excerpts which these Titles comprise have been already discussed and tabulated ; with the exception of the regulations as to the time at which the value of an article is to be estimated when claimed in a *condictio triticaria*. 12. 3. 3 : 12. 3. 4.

DE REBUS CREDITIS SI CERTUM PETETUR ET DE CONDICTIONE.

D. 12. 1.

1. Ulpianus libro uicensimo sexto ad edictum. Ere est, priusquam ad uerborum interpretationem perueniamus, pauca de significatione ipsius tituli referre. (1.) Quoniam igitur multa ad contractus uarios pertinentia iura sub hoc titulo praetor inseruit, ideo rerum creditarum titulum praemisit: omnes enim contractus, quos alienam fidem secuti instituimus, conplectitur: nam, ut libro primo quaestionum Celsus ait, credendi generalis appellatio est: ideo sub hoc titulo praetor et de commodato et

1. *Papinian.* It is proper to say a few words about the meaning of this Title itself, before proceeding to explain the statements contained therein. 1. The Praetor, then, affixed to it the name "Rerum Creditarum," because he inserted in it many rules relating to a variety of contracts: for it includes all the contracts into which we enter in dependence upon another's good faith[1]; since, as Celsus states in the first book of his *Quaestiones*, *credere* is a general expression: and so the Praetor also[2] included rules about loan and pledge

[1] Dependence on another's good faith is characteristic of all contracts; but the phrase "*alienam fidem sequi*" is specially applied to those contracts wherein we part with property to another in consideration of his engagement, voluntary or imposed by law, to give or do something, or to abstain from something in return. See Savigny, *Röm. Recht.* § 219.

[2] Papinian does not mean that the Praetor included the topics of *commodatum* and *pignus* under the title "De Rebus Creditis," merely because they involve a certain amount of dependence on another's good faith, in the fact that we entrust him with the *possession* of our property. This interpretation would not accord with what we have just stated, in the preceding note, as to

de pignore edixit. nam cuicumque rei adsentiamur alienam fidem secuti mox recepturi quid ex hoc contractu, credere dicimur. rei quoque uerbum ut generale praetor elegit.

2. Paulus libro uicensimo octauo ad edictum. Mutuum damus recepturi non eandem speciem quam dedimus (alioquin commodatum erit aut depositum), sed idem genus: nam si aliud genus, ueluti ut pro tritico uinum recipiamus, non erit mutuum. (1.) Mutui datio consistit in his rebus, quae pondere numero mensura consistunt, quoniam eorum datione possumus in creditum ire, quia in genere suo functionem recipiunt per solutionem quam specie: nam in ceteris rebus ideo in creditum

under this heading. For whenever we consent to anything in dependence on another's good faith and expecting hereafter to receive something under the contract, we are said "to trust" (*credere*). The Praetor also used the word *res* as being a comprehensive one.

2. *Paulus.* What we give is a *mutuum*, when we do not expect to receive back the identical thing which we gave, (if we do, it will be a *commodatum* or a *depositum*.) but the same kind: for if we are to receive back another kind, as wine in return for wheat, it will not be a *mutuum*[1]. 1. The giving of a *mutuum* is possible in the case of those things which can be weighed, counted or measured; since we can create ourselves creditors[2] by the giving of such, inasmuch as they admit of discharge by payment in their kind rather than in identity; for the reason why we cannot become creditors as to different

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the special character of the trust implied in *creditum*, viz. that it involves a parting with all proprietary rights. If a man does not deny our ownership of the deposit or pledge left in his hands, we can only proceed against him by a *bonæ fidei* action, *actio commodati* or *actio pigneraticia*. But if, after we have entrusted him with possession, he wrongfully assumes property, by consuming or alienating the article, he destroys our *vindicatio*; and to replace it we have a *condictio*, which we may, if we please, use instead of the *bonæ fidei* action. The *commodatum* or *pignus* has in fact by such supervening event been converted into a *creditum*, and the usual remedy for a breach of *creditum* is applicable. See Introduction, under heading (C), and the notes thereon.

[1] This will be *permutatio*, or *do ut des*, one of the so-called *innominate contracts*.

[2] *Creditum* here has a restricted signification. In other passages it denotes an expectation of a return, but here an expectation of a return *in genere*. This being an arbitrary sense attached to the word, the reasoning in the concluding part of the paragraph is merely arguing in a circle.

ire non possumus, quia aliud pro alio inuito creditori solui non potest. (2.) Appellata est autem mutui datio ab eo, quod de meo tuum fit: et ideo, si non fiat tuum, non nascitur obligatio. (3.) Creditum ergo a mutuo differt qua genus a specie: nam creditum consistit extra eas res, quae pondere numero mensura continentur sic, ut, si eandem rem recepturi sumus, creditum est. item mutuum non potest esse, nisi proficiscatur pecunia, creditum autem interdum etiam si nihil proficiscatur, ueluti si post nuptias dos promittatur. (4.) In mutui datione oportet dominum esse dantem, nec obest, quod filius familias et seruus dantes peculiares nummos obligant: id enim tale est, quale si uoluntate mea tu des pecuniam: nam mihi actio adquiritur, licet mei nummi non fuerint. (5.) Verbis quoque credimus quodam actu ad obligationem comparandam interposito, ueluti stipulatione.

matters is that one thing cannot be paid for another without the creditor's consent. 2. *Mutuum* derives its name from the circumstance that a thing becomes yours from being mine; and therefore if it does not become yours, the obligation does not arise. 3. Hence *creditum* differs from *mutuum* as a class from a species; for there is *creditum* in matters which do not admit of weighing, counting or measuring, so that it is a *creditum* even when we are to receive back the same article. Again, there can be no *mutuum* unless value is parted with, but there is sometimes *creditum* even though nothing be parted with, as, for instance, when a portion is promised subsequently to marriage[1]. 4. When a *mutuum* is given, the donor must be owner; and it is not contrary to this statement that a *filiusfamilias* and a slave bind (the receiver) by giving money which is part of their *peculium*: since this is a case similar to your giving money at my request, for the right of action accrues to me, although the money was not mine[2]. 5. We can also make ourselves creditors[3] verbally, when some formal act, such as a stipulation, is employed to create the obligation.

[1] *Creditum* is here used in a sense more sweeping than any previously employed, viz. an expectation which is not founded at all upon consideration given by ourselves, but is merely based on another's voluntary promise.

[2] The agent is regarded as making it mine when he lends it on my account.

[3] We can therefore have a contradiction; but the obligation is not *ex mutuo*.

3. Pomponius libro uicensimo septimo ad Sabinum. Cum quid mutuum dederimus, etsi non cauimus, ut aeque bonum nobis redderetur, non licet debitori deteriorem rem, quae ex eodem genere sit, reddere, ueluti uinum nouum pro uetere: nam in contrahendo quod agitur pro cauto habendum est, id autem agi intellegitur, ut eiusdem generis et eadem bonitate soluatur, qua datum sit.

4. Ulpianus libro trigensimo quarto ad Sabinum. Si quis nec causam nec propositum foenerandi habuerit et tu empturus praedia desideraueris mutuam pecuniam nec uolueris creditae nomine antequam emisses suscipere, atque ita creditor, quia necessitatem forte proficiscendi habebat, deposuerit apud te hanc eandem pecuniam, ut, si emisses, crediti nomine obligatus esses, hoc depositum periculo est eius qui suscepit. nam et qui rem uendendam acceperit, ut pretio uteretur,

3. *Pomponius.* When we have given anything as a *mutuum*, even though we have not specified that an article equally good is to be returned to us, the debtor may not return an inferior article of the same class, as new wine for old; for in contracting the intention[1] is supposed to be expressed, and the intention is understood to be that return shall be made of the same kind and of equal goodness with that given.

4. *Ulpian.* If a person had neither inducement[2] nor intention to put out money at interest, and you, intending to buy lands, asked him for a loan, but were not willing to take it up as money lent until you had made your purchase, and so the creditor, being, we will suppose, under a necessity to go away, deposited the said money with you, on the understanding that you would be bound for it as a loan, if you bought the lands; this deposit is at the risk of the receiver[3]. For so also will a man hold a thing at his own risk, when he has received it to sell on the understanding that he is to make use of the

[1] I.e. the tacit but reasonable intention. Accursius.

[2] "Ut meritum accipientis." Gothofred.

[3] *After* the purchase is made the depositary is clearly responsible, for even if he says he has not yet begun to treat the money as his own, it is through his own fault that he has not done so. But *before* the purchase it is also at his risk, for the deposit is *for his benefit*. There is, however, a dispute whether he is liable for *casus* as well as *culpa;* and probably he is not, for the money is still the lender's.

periculo suo rem habebit. (1.) Res pignori data pecunia soluta condici potest. et fructus ex iniusta causa percepti condicendi sunt: nam et si colonus post lustrum completum fructus perceperit, condici eos constat ita demum, si non ex uoluntate domini percepti sunt: nam si ex uoluntate, procul dubio cessat condictio. (2.) Ea, quae ui fluminum importata sunt, condici possunt.

5. Pomponius libro uicensimo secundo ad Sabinum. Quod te mihi dare oporteat si id postea perierit, quam per te factum erit quominus id mihi dares, tuum fore id detrimentum constat. sed cum quaeratur, an per te factum sit, animaduerti debebit, non solum in potestate tua fuerit id nec ne, aut dolo malo feceris quominus esset uel fuerit nec ne, sed etiam si

price of it. 1. A condiction[1] can be brought to recover a pledge, so soon as the debt has been discharged. Fruits also improperly taken can be sued for by condiction[2]; for it is the rule that if a tenant has taken fruits after the five years[3] are at an end, a condiction can be brought for them; unless they were taken with the landlord's consent; if, however, they were taken with his consent, the condiction obviously fails. 2. Articles carried on to another man's land by the violence of a stream can be the subject of a condiction[4].

5. *Pomponius.* If a thing which you ought to give to me perishes after a delay in its delivery has been occasioned by you, it is ruled that the loss will fall on you. But when the question is whether the delay was attributable to you, we shall have to consider not only whether it was under your control or not, or whether you maliciously caused it to be or to have been out of your control or did not, but, besides, whether there

[1] Gothofred says, and I think correctly, a *condictio furtiva* or *sine causa;* but Savigny inclines to think a simple *condictio*, as the original taking was innocent, and the conversion of possession into property merely turns the *pignus* into a *creditum*. Sav. *Röm. Recht*, App. XIV. §§ 6, 7.

[2] By *condictio sine causa* or *furtiva*, for the taking is wrong, not the subsequent circumstances. *Perceptio fructuum* began a new and separate title, and the fruits thenceforth were not a mere accessory of the land.

[3] The usual duration of a farming lease.

[4] As a rule we cannot bring a *condictio* for our own property: but there is an exception in the case of thieves, see Introduction (II): and the persons mentioned in §§ 1, 2 are practically though not technically thieves. "Non cadit furtum in rem soli."

aliqua iusta causa sit, propter quam intellegere deberes te dare oportere.

6. Paulus libro uicensimo octauo ad edictum. Certum est, cuius species uel quantitas, quae in obligatione uersatur, aut nomine suo aut ea demonstratione quae nominis uice fungitur qualis quantaque sit ostenditur. nam et Pedius libro primo de stipulationibus nihil referre ait, proprio nomine res appelletur, an digito ostendatur an uocabulis quibusdam demonstretur: quatenus mutua uice fungantur, quae tantundem praestent.

7. Ulpianus libro uicensimo sexto ad edictum. Omnia, quae inseri stipulationibus possunt, eadem possunt etiam numerationi pecuniae, et ideo et condiciones.

8. Pomponius libro sexto ex Plautio. Proinde mutui datio interdum pendet, ut ex post facto confirmetur: ueluti si dem tibi mutuos nummos, ut, si condicio aliqua extiterit, tui fiant sisque mihi obligatus: item si legatam pecuniam heres crediderit, deinde legatarius eam noluit ad se pertinere, quia heredis ex die aditae hereditatis uidentur nummi fuisse, ut

was any reasonable cause for your being obliged to keep in mind that it was your duty to give it.

6. *Paulus.* A thing is certain, when its individuality or its quantity, which is the matter of an obligation, is shewn to be of a certain kind and a certain amount by its name or by a description equivalent to a name. For Pedius, in his first book *On Stipulations*, says that it is immaterial whether the thing is called by its proper name, or pointed out with the finger, or described by certain words: since processes which effect the same result are equivalent one to the other.

7. *Ulpian.* All provisions which can be introduced into stipulations, can also be introduced into the delivery of money, and therefore so also can conditions.

8. *Pomponius.* Hence, the giving of a loan is sometimes dependent for its confirmation on some subsequent event; as, for instance, supposing I lend you money on terms that if some condition comes to pass it shall be yours, and you shall be under obligation to me; also when an heir lends money which is the matter of a legacy, and afterwards the legatee declines to accept the legacy; for the money is then considered to have belonged to the heir from the day he entered upon the

credita pecunia peti possit. nam Iulianus ait et traditiones ab herede factas ad id tempus redigi, quo hereditas adita fuerit, cum repudiatum sit legatum aut adpositum.

9. Ulpianus libro uicensimo sexto ad edictum. Certi condictio competit ex omni causa, ex omni obligatione, ex qua certum petitur, siue ex certo contractu petatur siue ex incerto: licet enim nobis ex omni contractu certum condicere, dummodo praesens sit obligatio: ceterum si in diem sit uel sub condicione obligatio, ante diem uel condicionem non potero agere. (1.) Competit haec actio etiam ex legati causa et ex lege Aquilia. sed et ex causa furtiua per hanc actionem condicitur.

inheritance, so that there can be a suit for money lent[1]. For Julian says that when a legacy or a share of an inheritance[2] is refused, transfers made by the heir[3] relate back to the time when entry on the inheritance took place.

9. *Ulpian.* A *condictio certi* can be employed on every ground and on every obligation where there is a claim for something certain, whether the claim be based on a certain or an uncertain contract[4]: for we may bring a *condictio certi* upon any contract, provided only there is a present obligation: but if the obligation be future or conditional, I shall not be able to sue before the time or the condition. 1. This action also avails in case of legacy and under the Lex Aquilia[5]. And a condiction can also be brought in this form on the ground

[1] Till the legatee accepts or refuses, the *mutuum* is in suspense; if he accepts, there is no *mutuum;* if he refuses, the *mutuum* by a fiction of law is supposed to have been good from the outset.

[2] Kellinghusen explains the word *adpositum* by a reference to D. 28. 5. 17. *pr.*, where an heir in part is spoken of as "cui pars adposita est." But Cujas would read, instead of *adpositum*, *acquisitum;* Baro, *aguitum;* Blume, *admissum*.

[3] *Heres* must mean *co-heres*, if we explain *adpositum* in the way Kellinghusen proposes.

[4] This does not refer to the subject of the contract; for if it did, the *condictio incerti* or *actio ex stipulatu* would never be wanted; but it refers to the nature of the contract, i.e. nominate or innominate. This is the view of Pothier and Savigny. See Pothier *ad loc.*; Sav. *Röm. Recht*, App. XIV. § 23.

[5] The *condictio certi* was not expressly granted by the Lex Aquilia; but was on the quasi-contract arising from the fact of the defendant realizing a benefit; still, as the benefit arose from the damage he committed, and that damage, *as it left it*, fell under the Lex Aquilia, it may be said, though somewhat inaccurately, that the condiction is *ex lege Aquilia*, "in connection with that *lex*."

sed et si ex senatus consulto agetur, competit haec actio, ueluti si is cui fiduciaria hereditas restituta est agere uolet. (2.) Siue autem suo nomine quis obligatus sit siue alieno, per hanc actionem recte conuenitur. (3.) Quoniam igitur ex omnibus contractibus haec certi condictio competit, siue re fuerit contractus factus siue uerbis siue coniunctim, referendae sunt nobis quaedam species, quae dignum habent tractatum, an haec actio ad petitionem eorum sufficiat. (4.) Numeraui tibi decem et haec alii stipulatus sum: nulla est stipulatio: an condicere decem per hanc actionem possim, quasi duobus contractibus interuenientibus, uno qui re factus est, id est numeratione, alio qui uerbis, id est inutiliter, quoniam alii stipulari non potui? et puto posse. (5.) Idem erit, si a pupillo fuero sine tutoris auctori-

of theft. This action also avails when proceedings are taken under a *senatusconsultum*, when, for instance, a person to whom a trust-inheritance has been transferred is wishful to sue[1]. 2. Further, whether a man be bound on his own behalf or on that of another, he is properly sued by this form of action. 3. Hence, as this *condictio certi* can be brought upon any contract, whether real or verbal or of a mixt[2] character, we must take notice of some transactions where it is proper to consider whether this form of action is adequate for their enforcement. 4. I have (for instance) paid to you ten *aurei*, and stipulated for their repayment to another person; the stipulation is void[3]: can I then bring a condiction in this form[4] for ten *aurei*, on the ground that there were two contracts, one real, i.e. effected by the payment, the other verbal, and therefore useless, because I cannot stipulate for the benefit of another? I think I can do so[5]. 5. The rule will be the same,

[1] The *fideicommissarius* was not a creditor, for the legal rights of the deceased devolved to the heir, the *fiduciarius*. But the S. C. Trebellianum enabled the *fideicommissarius* to sue and be sued, as if heir, in respect of the portion of the inheritance transferred. Hence he has amongst other actions the *condictio certi*.

[2] *Mixt* here means real *and* verbal: for example, when a lender who has delivered, or is about to deliver something, superadds a stipulation for repayment. Savigny thinks that Ulpian must have added *ex literis*, as his catalogue without this would be incomplete. *Röm. Recht*, App. XIV. § 24.

[3] Gai. *Comm.* 3. 103: Just. *Inst.* 3. 19. 4.

[4] Sc. in the form of a *condictio certi*.

[5] If a novation had been effected, there would only have been an action on the stipulation; and there would

tate stipulatus, cui tutore *auctore* credidi: nam et tunc manebit mihi condictio ex numeratione. (6.) Item quaeri potest et si, quod tibi numeraui, sub impossibili condicione stipuler: cum enim nulla sit stipulatio, manebit condictio. (7.) Sed et si ei numerauero, cui postea bonis interdictum est, mox ab eo stipuler, puto pupillo eum comparandum, quoniam et stipulando sibi adquirit. (8.) Si nummos meos tuo nomine dedero uelut tuos absente te et ignorante, Aristo scribit adquiri tibi condictionem: Iulianus quoque de hoc interrogatus libro decimo scribit ueram esse Aristonis sententiam, nec dubitari, quin, si meam pecuniam tuo nomine uoluntate tua dedero, tibi adquiritur obligatio, cum cottidie credituri pecuniam mutuam ab alio

if I have stipulated with a pupil without the authorization of his tutor, having previously lent to him with the authorization of his tutor; for then too I shall retain the condiction founded on the payment. 6. The question may also be raised, if I stipulate under some impossible condition for repayment of money which I have paid to you; for although the stipulation is void[1], the condiction will stand good. 7. And again, if I pay money to a person who subsequently is forbidden to manage his own business, and afterwards stipulate with him, I think he may be considered to be on the same footing with a ward, for the latter also acquires for himself by stipulation[2]. 8. If I pay on your account money of my own, as if it were yours, without your presence and knowledge, Aristo writes that the condiction is acquired by you[3]; and Julian also, having been consulted about this, writes in his tenth book that the opinion of Aristo is a correct one; and that there is no doubt as to the right being acquired by you, when I give my own money on your account with your consent; since every day when we want to lend money we ask some other person to

certainly have been a novation, if the stipulation had been binding either morally or legally; D. 46. 2. 1. 1. But the stipulation in the text is altogether void, hence there is no novation, and the first obligation remains effective.

[1] See *Inst.* 3. 19. 11.

[2] The ward can stipulate, although he cannot make a binding promise: and so too the prodigal is only interdicted from diminishing, not from increasing his estate. The *real* obligation stands good, as in the case previously mentioned, although a void stipulation is superadded to the valid *real* contract.

[3] Provided, of course, that you ratify my proceeding when it is brought to your knowledge.

poscamus, ut nostro nomine creditor *numeret* futuro debitori nostro. (9.) Deposui apud te decem, postea permissi tibi uti: Nerua Proculus etiam antequam moueantur, condicere quasi mutua tibi haec posse aiunt, et est uerum, ut et Marcello uidetur: animo enim coepit possidere. ergo transit periculum ad eum qui mutuam rogauit, et poterit ei condici.

10. Idem libro secundo ad edictum. Quod si ab initio, cum deponerem, uti tibi si uoles permisero, creditam non esse antequam mota sit, quoniam debitu iri non est certum.

11. Idem libro uicensimo sexto ad edictum. Rogasti me, ut tibi pecuniam crederem: ego cum non haberem, lancem tibi dedi uel massam auri, ut eam uenderes et nummis utereris. si uendideris, puto mutuam pecuniam factam. quod si lancem uel massam sine tua culpa perdideris prius quam uenderes, utrum mihi an tibi perierit, quaestionis est. mihi uidetur Neruae distinctio uerissima existimantis multum interesse,

lend, as our creditor, to the person who is about to become our debtor. 9. I deposited with you ten *aurei*, and afterwards gave you permission to use them[1]; Nerva and Proculus say that even before they are removed by you, I can bring a condiction for them as being a loan; and this is true, as Marcellus also thinks; for the possession is commenced by mere intent: hence the risk devolves on him who requested the loan, and a condiction can be brought against him.

10. *Ulpian.* But if, when I first deposited the money with you, I gave you permission to use it if you pleased, it is not a loan till it has been removed, for till then it is not certain that it will become a debt[2].

11. You requested me to lend you money: having none, I gave you a dish or an ingot of gold, that you might sell it and use the money. If you sold it, I think a loan was created. But if, before a sale was effected, you lost the dish or ingot without fault on your part, it is questionable whether the loss falls on me or on you. It seems to me that Nerva's discrimi-

[1] This is an instance of *traditio brevi manu:* detention, or the physical power of dealing with the thing as his own, already belongs to the *depositarius:* hence to create possession, and through possession property, there needs only a change of *animus*, and this is shewn by the fact of the new agreement.

[2] In this case the moving is the only possible test of the change of *animus*.

uenalem habui hanc lancem uel massam nec ne, ut, si uenalem habui, mihi perierit, quemadmodum si alii dedissem uendendam: quod si non fui proposito hoc ut uenderem, sed haec causa fuit uendendi, ut tu utereris, tibi eam perisse, et maxime si sine usuris credidi. (1.) Si tibi dedero decem sic, ut nouem debeas, Proculus ait, et recte, non amplius te ipso iure debere quam nouem. sed si dedero, ut undecim debeas, putat Proculus amplius quam decem condici non posse. (2.) Si fugitiuus seruus nummos tibi crediderit, an condicere tibi dominus

nation is a very correct one, for he holds that it is a most important point whether I was offering the dish or ingot for sale or not; for if I was offering it for sale, the loss is mine, just as it would have been, if I had entrusted it to some other person to sell; but if I had no intention of being a vendor, and the object of the sale was that you might use the proceeds, then the loss falls on you, especially if I lent it to you without charging interest[1]. 1. If I have given you ten *aurei* on condition that you be my debtor for nine, Proculus says, and rightly, that in strictness of law you only owe me nine. But if I have given them on condition that you be my debtor for eleven, Proculus holds that a condiction will not hold for more than ten[2]. 2. If a runaway slave has lent you money,

[1] Nerva evidently means that if you were my agent to sell the dish or ingot, the action I must bring against you, supposing the article is lost before a sale can be effected, is the *æstimatoria præscriptis verbis*. D. 19. 3. 1. The decision as to whose is the responsibility turns on this question: did I *lend* you the dish or ingot, with permission to sell it, if you could, and owe me the money instead of the dish? or did I put the dish or ingot into your hands to sell it, if possible, as my agent, and, if you could sell it, and *not till* then, to become my debtor for money lent. In the former case, no interest being charged, there is a *commodatum* until the moment when a *mutuum* arises; in the latter case you are only my agent till the same instant; and the words of D. 19. 5. 17. 1 shew clearly that I then bear the loss: "si quidem ego te venditorem rogavi, meum esse periculum, si tu me, tuum, si neuter nostrum, sed dumtaxat consensimus, teneri te hactenus ut dolum et culpam mihi præstes." See also D. 19. 5. 19. Africanus in D. 17. 1. 34 is generally supposed to decide to the contrary the self-same point which Ulpian here discusses; but Africanus' case seems to involve the important difference that his agent was to sell the article, and if he succeeded was *promised* a loan of the money; he ought therefore to have delivered the money to his principal, and then had it redelivered to him: here, however, by agreement of the parties the actual sale of the article is to stand also for a delivery *brevi manu* of the proceeds of its sale.

[2] The reason is given in D. 2. 14. 17. *pr.* "re enim non potest obligatio contrahi, nisi quatenus datum sit."

possit, quaeritur. et quidem si seruus meus, cui concessa est peculii administratio, crediderit tibi, erit mutua: fugitiuus autem uel alius seruus contra uoluntatem domini credendo non facit accipientis. quid ergo? uindicari nummi possunt, si extant, aut, si dolo malo desinant possideri, ad exhibendum agi: quod si sine dolo malo consumpsisti, condicere tibi potero.

12. Pomponius libro sexto ex Plautio. Si a furioso, cum eum compotem mentis esse putares, pecuniam quasi mutuam acceperis eaque in rem tuam uersa fuerit, condictionem furioso adquiri Iulianus ait: nam ex quibus causis ignorantibus nobis actiones adquiruntur, ex isdem etiam furioso adquiri. item si

the question is asked, can the master bring a condiction for it? If indeed my slave who lent you the money was one who had been permitted to manage his own *peculium*, there will be a loan[1]: but a runaway or other[2] slave does not make the money the receiver's property[3], when he lends it against the will of his owner. What then is our conclusion? The money, if still able to be identified, can be recovered by vindication; or if it has been fraudulently got rid of, there can be an *actio ad exhibendum:* and if you have spent it without fraud, I can bring a condiction against you[4].

12. *Pomponius.* If you have taken money, as if on loan[4], from a madman, thinking him to be sound of mind, and it has been expended to your profit, Julian says that a condiction is competent to the madman; for in whatever cases rights of action are acquired for us without our knowledge, in the same cases are they also acquired for a madman. So also, if any

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A *pactum adjectum* is upheld on the fiction that it is part of the original contract: hence a mere pact, to the detriment of the debtor, attached to a *real* contract, cannot increase his liability. It is the rule, however, that a pact to the detriment of the creditor may be pleaded as an exception, and so the creditor who has agreed to take nine will fail in his suit for ten. See D. 2. 14. 4. 3, also D. 12. 1. 40 below.

[1] Therefore on the loan I can bring a *condictio certi.*

[2] *Alius* = cui non concessa est peculii administratio.

[3] "Libera peculii administratio non permanet in fugitivo." D. 15. 1. 48.

[4] But only so far as the consumption has caused benefit to the innocent receiver; as we see from the next excerpt.

[5] As a madman cannot have intention, there is no true *mutuum*, but only a *quasi-mutuum*, till consumption cures the want of concurrence in intent on the part of lender and borrower.

is qui seruo crediderat furere coeperit, deinde seruus in rem domini id uerterit, condici furiosi nomine posse. et si alienam pecuniam credendi causa quis dederit, deinde furere coeperit et consumpta sit ea pecunia, condictionem furioso adquiri.

13. Ulpianus libro uicensimo sexto ad edictum. Nam et si fur nummos tibi credendi animo dedit, accipientis non facit, sed consumptis eis nascitur condictio. (1.) Unde Papinianus libro octauo quaestionum ait: si alienos nummos tibi mutuos dedi, non ante mihi teneris, quam eos consumpseris. quod si per partes eos consumpseris, an per partes tibi condicam, quaerit: et ait condicturum, si admonitus alienos nummos fuisse ideo per partem condico, quia nondum totos consumptos compereram. (2.) Si seruus communis decem crediderit, puto,

one became mad after having lent money to a slave, and then the slave expended it to his master's profit, there could be a condiction in the name of the madman[1]. So again, if any one has given the money of another on loan, and then become mad, and the money has been spent, there will be a condiction for the madman[2].

13. *Ulpian.* For a thief too, if he has given you money with the intent of lending, does not make it the property of the receiver, and yet when it is consumed a condiction arises[3]. 1. Hence in the eighth book of his *Quaestiones* Papinian says, if I have lent to you the money of another man, you are under no obligation to me until you have spent it[4]. But the question, arises, if you have spent part of it, can I bring a condiction against you for that part? and he replies that I can bring a condiction (for part), if my reason for bringing it for part, when I learned that the money was another person's, was that I knew the whole was not yet spent[5]. 2. If a slave owned in common

[1] If the slave had authority to borrow, there was of course a *mutuum* from the beginning. Consumption to the benefit of the master would give occasion to a *condictio*, even if the donor remained sane: so this *dictum* does not seem of much value.

[2] There would also be a condiction if the madness did not supervene, for as Accursius says, "mutuum reconciliatur consumptione." Hence, this dictum is as inconclusive as the one preceding it.

[3] Sc. a condiction can be brought *by the thief*.

[4] Till you spend it, I have no action, but the owner has a *vindicatio*. After the consumption, I am responsible to the owner in a *condictio*, and therefore you are responsible to me in one.

[5] I sue, of course, for the part

siue administratio seruo concessa est siue non, et consumantur nummi, quinum competere actionem: nam et si communes tibi nummos credidero centum, posse me quinquaginta condicere libro octauo quaestionum Papinianus scribit, etiamsi singula corpora communia fuerint.

14. IDEM libro uicensimo nono ad edictum. Si filius familias contra senatus consultum mutuatus pecuniam soluerit, patri nummos uindicanti nulla exceptio obicietur: sed si fuerint consumpti a creditore nummi, Marcellus ait cessare condictionem, quoniam totiens condictio datur, quotiens ex ea causa numerati sunt, ex qua actio esse potuisset, si dominium ad

has lent ten *aurei*, I think that, whether the slave had or had not permission to deal with his *peculium*, if the money has been spent, (each owner) has an action for five: for in the eighth book of his *Quaestiones* Papinian says that also in the case of my lending you a hundred coins of common property, I may bring my condiction for fifty, although each individual coin was common property[1].

14. *Ulpian.* If a *filiusfamilias* has borrowed money in contravention of the *senatusconsultum*[2], and repaid it, no exception will stand good against the father, if he brings a *vindicatio:* but if the money has been spent by the creditor, Marcellus says a condiction will not avail; for the condiction is only allowed in cases where money has been paid for a cause which would have given rise to an action[3], supposing the ownership

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consumed to your profit: if the whole had been spent to your profit, I should have brought the condiction for the whole. The part remaining unconsumed is no *mutuum*, but recoverable by vindication brought by the true owner.

[1] Though originally I am part owner of every coin, yet, as money is a *res fungibilis*, I have only a right to claim half in quantity, instead of half of each coin.

[2] Sc. *S. C. Macedonianum*, see D. 14. 6.

[3] *Actio* here = *condictio*. There is then a vindication of the money, if yet unconsumed; but no condiction when it has been consumed. The meaning of the passage is that when money is consumed in good faith by a person who has received it in a transaction generally lawful, but prohibited in a particular instance, there is a condiction (as opposed to a vindication) *in consequence of consumption* only when, but for the positive rule of law, there would have been a condiction *in consequence of the delivery*. In the present instance the *filiusfamilias repays* borrowed money: he therefore does what the law usually approves; and if he had been a *paterfamilias* he would have had no *condictio indebiti* to recover his money. Hence, consumption does not give his father the right to

accipientem transisset: in proposito autem non esset. denique per errorem soluti contra senatus consultum crediti magis est cessare repetitionem.

15. IDEM libro trigensimo primo ad edictum. Singularia quaedam recepta sunt circa pecuniam creditam. nam si tibi debitorem meum iussero dare pecuniam, obligaris mihi, quamuis meos nummos non acciperis. quod igitur in duabus personis recipitur, hoc et in eadem persona recipiendum est, ut, cum ex causa mandati pecuniam mihi debeas et conuenerit, ut crediti nomine eam retineas, uideatur mihi data pecunia et a me ad te profecta.

had passed to the receiver; and in the present case it would not be so. In fact, it is more reasonable that there should be no real action for borrowed money repaid by mistake in contravention of the *senatusconsultum*[1].

15. *Ulpian.* Some peculiar rules are allowed with regard to money lent. For if I have directed my debtor to give you money, you are liable to me, though you have not received money of mine. This rule, therefore, established for the case of two persons, must be applied if the person be the same, so that when you owe me money on mandate, and we have agreed that you are to retain it as a loan, the money is regarded as having been delivered to me, and retransferred by me to you[2].

a condiction, although his father can vindicate the unconsumed money. The creditor, of course, is supposed to be in good faith, that is, under the impression that the debt has been repaid with the father's consent, or repaid with money *extra patrimonium patris*. This consideration harmonizes the present passage with one at first sight contradictory to it, viz. D. 14. 6. 9. 1.

[1] The meaning of this remark appears to be, that on equitable principles there ought to be no *vindicatio* of money received through error in discharge of a debt morally binding: the law, however, disregards this principle when the actual coins repaid can be traced, though it follows equity when they have been consumed in good faith. There is no want of equity in refusing a *condictio* for money consumed under these circumstances of good faith, says Ulpian; the want of equity is rather in the other rule, which allows a *vindicatio* if the money is still unconsumed.

[2] In D. 41. 2. 34 we have an excerpt from Africanus, which appears at first sight to state a doctrine the very reverse of what is here laid down by Ulpian. Vinnius endeavours to explain the discrepancy by saying that Ulpian is speaking of an *agreement* between the *mandatarius* and *mandator*, whereas in Africanus' case there is only a *proffer* on the part of the *mandatarius* and *no acceptance* on the part of the

16. Paulus libro trigensimo secundo ad edictum. Si socius propriam pecuniam mutuam dedit, omnimodo creditam pecuniam facit, licet ceteri dissenserint: quod si communem numerauit, non alias creditam efficit, nisi ceteri quoque consentiant, quia suae partis tantum alienationem habuit.

17. Ulpianus libro primo disputationum. Cum filius familias uiaticum suum mutuum dederit, cum studiorum causa Romae ageret, responsum est a Scaeuola extraordinario iudicio esse illi subueniendum.

18. Idem libro septimo disputationum. Si ego pecuniam tibi quasi donaturus dedero, tu quasi mutuam accipias, Iulianus scribit donationem non esse: sed an mutua sit, uidendum. et puto nec mutuam esse, magisque nummos accipientis non fieri,

16. *Paulus.* If a partner has lent his own money, he converts it in any case into money lent, even though the other partners disapprove. But if he has paid over money owned in common, he does not convert it into money lent, unless the others also assent, because he has only power to alienate his own share.

17. *Ulpian.* When a *filiusfamilias*, staying at Rome for purposes of study, has lent his travelling money, Scævola held that he must be relieved by means of extraordinary procedure[1].

18. *Ulpian.* If I have delivered to you money with the intent of conferring a gift, and you receive it as a loan, Julian says that there is no gift. Let us then consider whether there is a loan. I think that there is not, and that the money does

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mandator. But this explanation is unsatisfactory; for Africanus implies further on that there was a *nuda pactio*, or, in other words, that the proffer to hold on loan was assented to. A better solution of the difficulty is that of Voet, who says that in the case discussed by Africanus the communication between the *mandator* and *mandatarius* was by letter, and that Ulpian's hypothesis implies an agreement *inter praesentes*. The question at issue between the two Jurists is not whether there is a binding agreement or not, but whether the contract, if there be one at all, is a *mutuum*. Fictions must imitate nature, and therefore the parties must be in presence one of the other, in order that a *traditio brevi manu* may be presumed. See in support of this view D. 6. 1. 47: D. 41. 2. 1. 21: D. 47. 2. 43 (44). 2.

[1] He has besides an *utilis actio*, at any rate in cases where the usual remedy for a *paterfamilias* would be by *actio injuriarum*, *quod vi aut clam*, *depositi*, *commodati*, *mandati*, *crediti*, *furti*, *ex lege Aquilia*. D. 5. 1. 18. 1: D. 44. 7. 9 and 13.

cum alia opinione acceperit. quare si eos consumpserit, licet condictione teneatur, tamen doli exceptione uti poterit, quia secundum uoluntatem dantis nummi sunt consumpti. (1.) Si ego quasi deponens tibi dedero, tu quasi mutuam accipias, nec depositum nec mutuum est: idem est et si tu quasi mutuam pecuniam dederis, ego quasi commodatam ostendendi gratia accepi: sed in utroque casu consumptis nummis condictioni sine doli exceptione locus erit.

19. Iulianus libro decimo digestorum. Non omnis numeratio eum qui accepit obligat, sed quotiens id ipsum agitur, ut confestim obligaretur. nam et is, qui mortis causa pecuniam donat, numerat pecuniam, sed non aliter obligabit accipientem, quam si exstitisset casus, in quem obligatio collata fuisset, ueluti si donator conualuisset aut is qui accipiebat prior deces-

not become the property of the receiver at all, seeing that he took it under a mistake[1]. Hence, although he is liable to a condiction, if he has spent it, he can employ the exception of fraud, because the money has been spent according to the intention of the giver. 1. If I have delivered money to you as a deposit, and you receive it as a loan, it is neither a deposit nor a loan. So again in the case where you have given money as a loan for use, and I have received it as a loan for exhibition; but in both these cases, if the money has been spent, a condiction can be brought, which will not be defeated by the exception of fraud[2].

19. *Julian.* Delivery (of money) does not invariably put the receiver under obligation, but only when there is a present intent that he should be immediately bound. For the giver of a donation *mortis causa* pays over the money, but will not put the receiver under obligation[3], unless the event happens on which the obligation was made to depend, the recovery of the donor, for instance, from sickness, or the prior death of the

[1] See my note on D. 41. 1. 36. *Technically* the money does not become the property of the receiver, and therefore a *vindicatio* can be brought, if the money is still unconsumed, and a *condictio sine causa*, if it has been consumed. But both the *vindicatio* and the *condictio* can be met successfully by the *exceptio doli*, so *practically* the ownership of the money passes.

[2] In these cases there is only a delivery of detention, not a delivery of possession, but consumption cures this defect.

[3] Sc. the obligation to treat the money as a *mutuum* and return it.

sisset. et cum pecunia daretur, ut aliquid fieret, quamdiu in pendenti esset, an id futurum esset, cessabit obligatio: cum uero certum esse coepisset futurum id non esse, obligabitur qui accepisset: ueluti si Titio decem dedero, ut Stichum intra kalendas manumitteret, ante kalendas nullam actionem habebo, post kalendas ita demum agere potero, si manumissus non fuerit. (1.) Si pupillus sine tutoris auctoritate crediderit aut soluendi causa dederit, consumpta pecunia condictionem habet uel liberatur non alia ratione, quam quod facto eius intellegitur ad eum qui acceperit peruenisse: quapropter si eandem pecuniam is, qui in creditum uel in solutum acceperat, alii porro in creditum uel in solutum dederit, consumpta ea et ipse pupillo obligatur uel eum a se liberabit et eum cui dederit obligatum habebit uel se ab eo liberabit. nam omnino qui alienam pecuniam credendi causa dat, consumpta ea habet obligatum

receiver[1]. Again, supposing money to be given that something may be done, so long as it is doubtful whether it will be done or not, the obligation will be in suspense; but when it becomes certain that it will not be done, the receiver will be bound; for instance, if I have given to Titius ten *aurei* to set Stichus free before the Kalends, till the Kalends I shall have no action, and after the Kalends I can only sue, if he has not been manumitted[2]. 1. If a pupil has lent money or discharged a debt without his tutor's authorization, he has a condiction or is released from debt by the money being spent[3], for this reason and no other, that clearly through his act the money reached the person who received it; therefore, if the person who received the money on loan or in payment, has passed it to another on loan or in payment, the second possessor, when it has been spent (by the third), becomes under obligation to the pupil or sets the pupil free from obligation to himself, and puts under obligation the person to whom he gave the money or frees himself from obligation to that person. For in all cases he who gives another's money on loan has the

[1] Julian mentions two of the three possible causes for return of a *donatio mortis causa*. The third is *donatoris poenitentia*, the donor's change of purpose.

[2] The proper form of condiction in this case will be *condictio causa data causa non secuta*. D. 12. 4. 8.

[3] Spent so as not to be traceable: for then, as it has been used to his profit, equity treats it as if it had been made his originally. So long as it is not spent or is traceable, there is a *vindicatio* for its recovery.

eum qui acceperit: item qui in solutum dederit, liberabitur ab eo qui acceperit.

20. IDEM libro octauo decimo digestorum. Si tibi pecuniam donassem, ut tu mihi eandem crederes, an credita fieret? dixi in huiusmodi propositionibus non propriis uerbis nos uti, nam talem contractum neque donationem esse neque pecuniam creditam: donationem non esse, quia non ea mente pecunia daretur, ut omnimodo penes accipientem maneret: creditam non esse, quia exsoluendi causa magis daretur, quam alterius obligandi. igitur si is, qui pecuniam hac condicione accepit, ut mihi in creditum daret, acceptam dederit, non fore creditam: magis enim meum accepisse intellegi debeo. sed haec intellegenda sunt propter suptilitatem uerborum: benignius tamen est utrumque ualere.

21. IDEM libro quadragensimo octauo digestorum. Quidam existimauerunt neque eum, qui decem peteret, cogendum

receiver under obligation so soon as the money is spent; and in the same event he who gives money in payment will be free from obligation to the receiver.

20. *Julian.* If I gave you money on condition that you were to lend me the same, would there be a loan? I replied that in supposed cases of this sort we were not employing correct appellations, for that such a contract is neither a gift nor a loan: it is not a gift, because the money was not given with the intent that it should under all circumstances remain with the receiver; it is not a loan, because it was given[1] rather to discharge a duty than to lay a duty on another. Therefore, if a man who received money on the condition that he should lend it to me again, has given it back to me after receiving it, this will not be a loan; for I ought rather to be considered to have received what was mine already. But these we must hold to be the rules if we follow the strict meaning of the words[2]; and yet it is more equitable to consider both gift and loan to stand good.

21. *Julian.* Some authorities have laid down a rule that a man who claims ten cannot be compelled to take five and

[1] Sc. when the second transfer took place.

[2] Sc. the words *donatio* and *mutuum*. Julian's final remark implies that the strict meaning of the words was not insisted on. The *mutuum* therefore was sufficient to found a *condictio certi*.

quinque accipere et reliqua persequi, neque eum, qui fundum suum diceret, partem dumtaxat iudicio persequi: sed in utraque causa humanius facturus uidetur praetor, si actorem compulerit ad accipiendum id quod offeratur, cum ad officium eius pertineat lites deminuere.

22. IDEM libro quarto ex Minicio. Vinum, quod mutuum datum erat, per iudicem petitum est: quaesitum est, cuius temporis aestimatio fieret, utrum cum datum esset an cum litem contestatus fuisset an cum res iudicaretur. Sabinus respondit, si dictum esset quo tempore redderetur, quanti tunc fuisset, *si dictum non esset, quanti tunc fuisset*, cum petitum esset. interrogaui, cuius loci pretium sequi oporteat. respondit, si conuenisset, ut certo loco redderetur, quanti eo loco esset, si dictum non esset, quanti ubi esset petitum.

23. AFRICANUS libro secundo quaestionum. Si eum

sue for the balance, nor a man who asserts that a field is his, to (take part and) bring an action for part only; but in both these instances it seems as if the Praetor would take the more reasonable course by compelling the plaintiff to accept what is tendered, for it is his duty to diminish litigation[1].

22. *Julian.* Wine which had been lent was sued for before a *judex:* the question was, at what moment should its value be taken, at the time when it was given, or at the time of the *litis contestatio*, or at the time of the judgment. Sabinus gave an opinion, that if mention had been made of the time when it was to be returned, its value should be taken then; if there was no such mention[2], its value at the time when it was sued for. I asked of what place should we take the price. He replied, if there was an agreement for it to be repaid at a certain place, the price of that place; if it was not specified, the price of the place where it was sued for[3].

23. *Africanus.* Supposing a slave has been left to you

[1] The debtor cannot tender one thing instead of another, if he admits his obligation: but he may tender a smaller amount *in genere*, when the very question in debate is the amount of the obligation. See D. 46. 3. 50 and 99; D. 20. 6. 15. If the creditor refuses to accept the money tendered, and it is subsequently lost without fault of the debtor, the loss falls on the creditor. D. 46. 3. 72. *pr.*

[2] The words printed in italics in the text are not to be found in the MSS., but it is obvious they have been omitted through oversight of the copyist.

[3] This excerpt obviously has reference to the *condictio triticaria*, and not to the *condictio certi*.

seruum, qui tibi legatus sit, quasi mihi legatum possederim et uendiderim, mortuo eo posse te mihi pretium condicere Iulianus ait, quasi ex re tua locupletior factus sim.

24. Ulpianus libro singulari pandectarum. Si quis certum stipulatus fuerit, ex stipulatu actionem non habet, sed illa condicticia actione id persequi debet, per quam certum petitur.

25. Idem libro singulari de officio consularium. Creditor, qui ob restitutionem aedificiorum crediderit, in pecuniam quam crediderit priuilegium exigendi habebit.

26. Idem libro quinto opinionum. Si pecuniam militis procurator eius mutuam dedit fideiussoremque accepit, exemplo eo quo si tutor pupilli aut curator iuuenis pecuniam alterutrius

as a legacy, and I take possession of him as if he had been left to me, and sell him, Julian says that even though he be dead, you can bring a condiction against me, on the ground that I have been enriched by means of your property[1].

24. *Ulpian.* If a person has stipulated for a definite sum of money, he has not an action *ex stipulatu*, but should prosecute his claim by the condiction for the recovery of a specific sum of money[2].

25. *Ulpian.* A creditor who has lent for the repair of buildings will have a priority in recovering the money which he lent.

26. *Ulpian.* If the agent of a soldier has lent the soldier's money and taken a surety for it, it has been decided that an action is to be granted to the soldier himself, to whom the money belonged, in the same manner as (an action is granted) when a tutor has stipulated for the money of his ward which

[1] See also C. 4. 51. 1. The *condictio certi* avails, because you treat me as a *negotiorum gestor*, who has received money for you and holds it by your permission.

[2] Sc. by *condictio certi*. This *condictio* was not applicable to the recovery of anything but a fixed sum of money. We must admit that *certum* in this passage might grammatically denote any thing definite, i.e. a certain quantity of *res fungibiles* or a specific thing: but we must not imagine that Ulpian here contradicts his own express statement in D. 13. 3. 1, and therefore must restrict the meaning of *certum*, and regard it as equivalent to *certa pecunia*. See Introduction (E).

eorum creditam stipulatus fuerit, actionem dari militi cuius pecunia fuerit placuit.

27. IDEM libro decimo ad edictum. Ciuitas mutui datione obligari potest, si ad utilitatem eius pecuniae uersae sunt: alioquin ipsi soli qui contraxerunt, non ciuitas tenebuntur.

28. GAIUS libro uicensimo primo ad edictum prouinciale. Creditor, qui non idoneum pignus accepit, non amittit exactionem eius debiti quantitatis, in quam pignus non sufficit.

29. PAULUS libro quarto ad Plautium. Si institorem seruum dominus habuerit, posse dici Iulianus ait etiam condici ei posse, quasi iussu eius contrahatur, a quo praepositus sit.

30. IDEM libro quinto ad Plautium. Qui pecuniam creditam accepturus spopondit creditori futuro, in potestate habet, ne accipiendo se ei obstringat.

has been lent, or a curator for that of the youth under his charge[1].

27. *Ulpian.* A municipality can be bound by the delivery to them of a loan, if the money was employed to their benefit; otherwise, those alone who made the contract, and not the municipality, will be bound.

28. *Gaius.* A creditor who has taken an insufficient pledge does not lose his right to exact the balance not covered by the pledge.

29. *Paulus.* If a master has employed a slave as his *institor*, Julian says that it may be laid down that a condiction can also[2] be brought against the master, on the ground that the slave contracts by command of the person by whom he was put in charge.

30. *Paulus.* A person who has made a promise to an intended creditor when purposing to take a loan, has it in his own power to avoid binding himself to the other by taking it[3].

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[1] This is because the money is lent on their account, and not merely because the money is theirs. If the money belonged to one man, but was lent by another, as if it were his own, the condiction against the receiver belongs to the latter. C. 4. 2. 2: C. 4. 2. 7.

[2] Sc. in addition to an *actio institoria*, if the slave's contract is a *mutuum*.

[3] He is not liable in a *condictio certi*, since *mutuum* is a real contract, and he has not received anything: whether he is not liable for damages, if the non-receipt was through his default, is another question.

31. IDEM libro septimo decimo ad Plautium. Cum fundus uel homo per condictionem petitus esset, puto hoc nos iure uti, ut post iudicium acceptum causa omnis restituenda sit, id est omne, quod habiturus esset actor, si litis contestandae tempore solutus fuisset. (1.) Seruum tuum imprudens a fure bona fide emi: is ex peculio, quod ad te pertinebat, hominem parauit, qui mihi traditus est. Sabinus Cassius posse te mihi hominem condicere: sed si quid mihi abesset ex negotio quod is gessisset, inuicem me tecum acturum. et hoc uerum est: nam et Iulianus ait uidendum, ne dominus integram ex empto actionem habeat, uenditor autem condicere possit bonae fidei

31. *Paulus.* When a field or a slave is claimed by condiction, I think we observe the rule that all accruals after issue joined must be delivered up, i.e. all that the plaintiff would have had, if payment had been made at the moment of the *litis contestatio*. 1. I bought your slave[1] without knowing (he was yours) in good faith from a thief; he purchased a slave out of his *peculium* which belonged to you[2], and this *seruus vicarius* was delivered to me[3]. Sabinus and Cassius think that you can bring a condiction for the *vicarius* against me[4]; but that if I have suffered any loss by what the *ordinarius* did[5], I in my turn can sue you. And this is correct, for Julian also says we must consider[6] whether the owner has not his action *ex empto* safe, whilst the vendor can bring a condiction against the *bona fide* possessor[7]. As to the purchase money

[1] This excerpt is to be found in D. 19. 1. 24. 1, as well as here.

[2] Sc. *nec operis suis nec ex re mea quaesitum:* Gaii *Comm.* 2. 92. Just. *Inst.* 2. 9. 4.

[3] He was therefore in my possession, as I supposed myself owner of the *ordinarius*. He would have been in your possession, if he had been delivered to the *ordinarius* himself. See D. 41. 1. 21. *pr.*; D. 41. 1. 54. 4.

[4] This is because I received him *sine causa*.

[5] I may, for example, have been put to expense in finding him board and lodging, for this may have come out of my own funds, or those comprised in the *peculium* of the *ordinarius* which appertains to me. If you sue me for the slave, I can claim these expenses as a set-off. If I have already delivered the slave to you, I can bring a *condictio incerti* to recover my expenses. D. 12. 6. 40. 1.

[6] *Videndum sit:* this implies here, as it does often elsewhere, that the writer held the affirmative.

[7] The owner of the *ordinarius* has an action *ex empto* against the man who sold the *vicarius* to the *ordinarius*, for he has delivered him to a wrong person. But to prevent this vendor suffering hurt, he has in turn a *condictio sine causa* against

emptori. quod ad peculiares nummos attinet, si exstant, uindicare eos dominus potest, sed actione de peculio tenetur uenditori, ut pretium soluat: si consumpti sint, actio de peculio euanescit. sed adicere debuit Iulianus non aliter domino serui uenditorem ex empto teneri, quam si ei pretium solidum et quaecumque, si cum libero contraxisset, deberentur, dominus serui praestaret. idem dici debet, si bonae fidei possessori soluissem, si tamen actiones, quas aduersus eum habeam, praestare domino paratus sim.

32. Celsus libro quinto digestorum. Si et me et Titium mutuam pecuniam rogaueris, et ego meum debitorem tibi promittere iusserim, tu stipulatus sis, cum putares eum Titii debi-

which came out of the *peculium*,—if it be traceable, the owner (of the *ordinarius*) can bring a vindication for it, but he will then be liable to the vendor's action *de peculio* for enforcement of payment[1]; if it has been spent, the action *de peculio* falls through[2]. But Julian ought to add that the vendor is only liable *ex empto* to the owner of the slave, when the owner of the slave has paid to him the full price and anything else which would have been due, if he had made his contract with a freeman[3]. The same must be said[4], if I have delivered the *vicarius* to the *bona fide* possessor (of the *ordinarius*), provided only that I am prepared to transfer to the *dominus* the actions which I have against the possessor[5].

32. *Celsus.* If you have asked both Titius and me to lend you money, and I have directed my debtor to promise it to you, and you have stipulated with him under the supposition

the *bonae fidei* possessor of the *ordinarius*, to whom the *vicarius* was delivered.

[1] The actual purchase money is his own, but if he reclaims it and yet keeps the slave (i.e. the *vicarius*), good faith requires that he should pay for the slave with other money.

[2] Consumption makes the purchase money the property of the vendor; hence the action *de peculio* falls through, because there is no *condictio* (as of course there is no *vindicatio*) for the purchase money. The vendor has received his payment, and cannot lose it again, so as to require the *actio de peculio*.

[3] Julian is contrasting the rights of the vendor as plaintiff, and of the *dominus ordinarii* as plaintiff. If the former sues, he can only claim to the extent of the *peculium* of the *ordinarius:* if the latter, he can claim the slave or his full value, if he has himself done all that good faith requires. *Et quaecumque* &c. includes interest, for instance, if he claims fulfilment of the contract some time after it was made.

[4] Sc. that the vendor is not liable to the action *ex vendito* of the *dominus ordinarii*.

[5] Sc. the *condictio sine causa* or *condictio indebiti*.

torem esse, an mihi obligaris? subsisto, si quidem nullum negotium mecum contraxisti: sed propius est ut obligari te existimem, non quia pecuniam tibi credidi (hoc enim nisi inter consentientes fieri non potest): sed quia pecunia mea ad te peruenit, eam mihi a te reddi bonum et aequum est.

33. Modestinus libro decimo pandectarum. Principalibus constitutionibus cauetur, ne hi qui prouinciam regunt quiue circa eos sunt negotientur mutuamue pecuniam dent foenusue exerceant.

34. Paulus libro secundo sententiarum. Praesidis prouinciae officiales, quia perpetui sunt, mutuam pecuniam dare et foenebrem exercere possunt. (1.) Praeses prouinciae mutuam pecuniam foenebrem sumere non prohibetur.

35. Modestinus libro tertio responsorum. Periculum nominum ad eum, cuius culpa deterius factum probari potest, pertinet.

that he was a debtor of Titius, are you under obligation to me? I doubt it, since you made no contract with me; but yet it is more proper that I should consider you bound, not because I have lent you money (for there cannot be a loan except between consenting parties), but because it is right and fair that when my money[1] has come into your hands, it should be returned by you.

33. *Modestinus.* It is laid down in the Imperial Constitutions that provincial governors and their officials shall not engage in trade, lend money or take interest.

34. *Paulus.* The officials of the governor of a province, since their office is a standing one, can lend money and take interest. 1. The governor of a province is not forbidden to borrow money on interest.

35. *Modestinus.* The responsibility for outstanding debts falls on the person by whose fault the debt can be proved to have become insecure.

[1] I.e. money due to me, or money that is mine by a fiction of *brevi manu* delivery, for as my debtor pays you the money, it may be feigned that he paid it to me first and that I then lent it to you. On this hypothesis there would be a *condictio certi:* but although Pothier favours this theory, it seems more reasonable to allow a *condictio sine causa;* for although you would have taken the money, if you had known it was mine, yet in fact you took it without knowledge that it was mine, and so without proper cause, because not in fulfilment of our agreement.

36. IAVOLENVS libro primo epistularum. Pecuniam, quam mihi sine condicione debebas, iussu meo promisisti Attio sub condicione: cum pendente condicione in eo statu sit obligatio tua aduersus me, tamquam sub contrariam condicionem eam mihi spopondisti, si pendente condicione petam, an nihil acturus sum? respondit: non dubito, quin mea pecunia, quam ipse sine condicione stipulatus sum, etiam si condicio in persona Attii, qui ex mea uoluntate eandem pecuniam sub condicione stipulatus est, non extiterit, credita esse permaneat: (perinde est enim, ac si nulla stipulatio interuenisset): pendente autem causa condicionis idem petere non possum, quoniam, cum incertum sit, an ex ea stipulatione deberi possit, ante tempus petere uideor.

37. PAPINIANVS libro primo definitionum. Cum ad praesens tempus condicio confertur, stipulatio non suspenditur et, si condicio uera sit, stipulatio tenet, quamuis tenere contra-

36. *Javolenus.* By my direction you promised to Attius conditionally money which you already owed me unconditionally. Now, inasmuch as, whilst the condition is pending, your obligation towards me is in the same position as if you had promised the money to me on the contrary condition, shall I sue to no effect, if I sue whilst the condition still pends? It was replied: I have no doubt that my money, which I myself stipulated for unconditionally, continues to be money lent, even though the condition does not come to pass with reference to Attius, who stipulated conditionally for the same money with my consent. For the case is (in that event) the same as if no second stipulation had been introduced: but, pending the decision of the condition, I cannot sue for the sum, for, inasmuch as it remains uncertain whether it can become due under that stipulation, I appear to sue before the time.

37. *Papinian*[1]. When a condition is made to depend on the present moment, the stipulation is not in suspense, and if the condition be a reality the stipulation is binding, although the contracting parties may not know that the condition holds;

[1] The excerpts 37, 38, 39 are evidently misplaced, no unusual circumstance in the Pandects, and belong properly to D. 45. 1, *De verborum obligationibus.* They have been introduced here, because a stipulation can be the ground of a *condictio, certi, triticaria* or *incerti.*

hentes condicionem ignorent, ueluti 'si rex Parthorum uiuit, 'centum mihi dari spondes?' eadem sunt et cum in praeteritum condicio confertur.

38. SCAEVOLA libro primo quaestionum. Respiciendum enim esse, an, quantum in natura hominum sit, possit scire eam debitu iri.

39. PAPINIANUS libro primo definitionum. Itaque tunc potestatem condicionis optinet, cum in futurum confertur.

40. PAULUS libro tertio quaestionum. Lecta est in auditorio Aemilii Papiniani praefecti praetorio iuris consulti cautio huiusmodi: 'Lucius Titius scripsi me accepisse a Publio 'Maeuio quindecim mutua numerata mihi de domo, et haec 'quindecim proba recte dari kalendis futuris stipulatus est 'Publius Maeuius, spopondi ego Lucius Titius. si die supra 'scripta summa Publio Maeuio eiue ad quem ea res pertinebit 'data soluta satisue eo nomine factum non erit, tunc eo

for example, "if the king of the Parthians is alive, do you engage to give me a hundred *aurei*?" So also is it when the condition depends on the past.

38. *Scaevola.* For we have to consider whether it is possible, by human capacity, to ascertain that the money will be due[1].

39. *Papinian.* Hence, it has the force of a condition when it depends on the future.

40. *Paulus*[2]. In the court of Aemilius Papinianus, the Praetorian Prefect and Jurisconsult, there was recited a memorandum thus worded: "I, Lucius Titius, admit in writing that I have received fifteen *aurei* on loan from Publius Maevius, paid to me out of his estate[3], and Publius Maevius has stipulated that these fifteen *aurei* shall be well and truly paid on the first day of next month, and I, Lucius Titius, have so engaged. If the sum shall not be given and paid on the day before-mentioned to Publius Maevius or to him who is entitled to it[4], or if sureties be not given for the same, then addition-

[1] Sc. we have to consider, not whether the parties knew at the time, but whether it was within the bounds of possibility that they might have known at the time.

[2] This excerpt again is misplaced. It belongs to the topic of Pacts, and should have been placed in D. 2. 14.

[3] See Dirksen, *sub verb.*

[4] Sc. "to Publius Maevius or his heir," as we see from the concluding words of the compact.

'amplius, quo post soluam, poenae nomine in dies triginta inque 'denarios centenos denarios singulos dari stipulatus est Publius 'Maeuius, spopondi ego Lucius Titius. conuenitque inter nos, 'uti pro Maeuio ex summa supra scripta menstruos refundere 'debeam denarios trecenos ex omni summa ei herediue eius.' quaesitum est de obligatione usurarum, quoniam numeros mensium, qui solutioni competebat, transierat. dicebam, quia pacta in continenti facta stipulationi inesse creduntur, perinde esse, ac si per singulos menses certam pecuniam stipulatus, quoad tardius soluta esset, usuras adiecisset: igitur finito primo mense primae pensionis usuras currere, et similiter post secundum et tertium tractum usuras non solutae pecuniae pensionis crescere, nec ante sortis non solutae usuras peti posse quam ipsa sors

ally, in proportion to the time of my default in payment, Publius Maevius has stipulated that by way of penalty there shall be given a *denarius* for every thirty days and for every hundred *denarii*, and I, Lucius Titius, have so engaged. And it is agreed[1] between us that for the convenience of Maevius I shall, out of the before-named sum, repay each month three hundred *denarii* of the entire amount to him or his heir." The question was as to the obligation to pay interest, for he had exceeded the number of months allowed[2] for the payment. I replied, that as pacts made concurrently with a stipulation are considered to form part of it, the case is the same as if he had stipulated for a particular sum each month, and imposed interest for payments made after date; therefore, when the first month had expired, interest ran on the first instalment, and so after the second and third interval interest accrued on the unpaid money of the instalment, and interest for unpaid principal[3] could not be demanded till the principal

[1] *Convenit.* This change of phrase implies that the clause for payment by instalments was a further arrangement by way of *pactum adjectum*, not formally stipulated. On the original agreement the whole sum was due on a day specified, but for the convenience of the creditor, "pro Publio Maevio," the first instalment alone was to be paid then, and further instalments at later dates.

[2] Sc. allowed by the pact providing for payment by instalments. Interest was due according to the original stipulation, but an extension of time had been allowed by the pact. How then did this affect the reckoning of interest?

[3] I.e. on unpaid instalments of the principal. The interest was due *ex mora*, and there was no default when payments were postponed by the pact.

peti potuerat. pactum autem quod subiectum est quidam dicebant ad sortis solutionem tantum pertinere, non etiam ad usurarum, quae priore parte simpliciter in stipulationem uenissent, pactumque id tantum ad exceptionem prodesse, et ideo non soluta pecunia statutis pensionibus ex die stipulationis usuras deberi, atque si id nominatim esset expressum. sed cum sortis petitio dilata sit, consequens est, ut etiam usurae ex eo tempore, quo moram fecit, accedant, et si, ut ille putabat, ad exceptionem tantum prodesset pactum (quamuis sententia diuersa optinuerit), tamen usurarum obligatio ipso iure non committetur: non enim in mora est is, a quo pecunia propter exceptionem peti non potest. sed quantitatem, quae medio tempore colligitur, stipulamur, cum condicio exstiteret, sicut est in

itself could be demanded. But some maintained that the added pact merely referred to the payment of the principal, and not also to that of the interest, which had been made the matter of an absolute[1] stipulation in the earlier part (of the agreement), and that the pact only availed as an exception; and therefore when the money was not paid by the prescribed payments, interest was due from the date of the stipulation[2], just as if it had been expressly so stated. But as the recovery of the principal was postponed[3], it follows that the interest also accrues from the time when the debtor made default; and even if, as he thought[4], the pact only availed as an exception (although the opposite opinion was approved), yet still a liability to interest will not be incurred through the letter of the law[5]; for a man is not in default when money cannot be claimed from him because of an exception. We do, however, (sometimes) stipulate that the amount which accrues during the intermediate time (shall be paid) when the condition vests, as

[1] "*Simpliciter*, i.e. non facta diuisione per tempora." Accursius.

[2] From the *dies venit* of the stipulation, that is *ex futuris kalendis*.

[3] Sc. by the *pactum adjectum*.

[4] Paulus forgets that he said *quidam putabant*, and writes "as the *objector* thought," instead of "as the *objectors* thought."

[5] It was incurred by the letter of the law, if the *pactum adjectum* was not part of the contract. But it was part of the contract. Still, if, for argument's sake, it had only furnished an exception, the interest would not have been exacted according to the letter of the law, though due according to the letter of the law; for the letter of the law would have been overridden by the exception.

fructibus: idem et in usuris potest exprimi, ut ad diem non soluta pecunia quo competit usurarum nomine ex die interpositae stipulationis praestetur.

41. Africanus libro octauo quaestionum. Eius, qui in prouincia Stichum seruum kalendario praeposuerat, Romae testamentum recitatum erat, quo idem Stichus liber et ex parte heres erat scriptus: qui status sui ignarus pecunias defuncti aut exegit aut credidit, ut interdum stipularetur et pignora acciperet. consulebatur quid de his iuris esset. placebat debitores quidem ei qui soluissent liberatos esse, si modo ipsi quoque ignorassent dominum decessisse. earum autem summarum nomine, quae ad Stichum peruenissent, familiae herciscundae quidem actionem non competere coheredibus,

for example in the case of fruits: the same also may be expressed in the case of interest, so that when the money is not paid to the day, that sum shall be paid which has accrued as interest from the date when the stipulation was made[1].

41. *Africanus.* A testament was published at Rome, made by a person who had appointed his slave Stichus to manage his money-matters[2] in a province, wherein the said Stichus was made free and heir in part. He, not knowing his condition, got in or lent money of the deceased, in such wise that he occasionally[3] stipulated and took pledges. An opinion was requested as to the legal bearing of these acts. It was held that, at any rate, the debtors who had paid him were acquitted, provided only they, as well as he, were unaware that his master was dead. But with regard to the sums which had come into Stichus' hands, the heirs had no *actio familiae erciscundae*[4], though an *actio negotiorum gestorum* ought to be

[1] This concluding paragraph merely states that express agreement can override the presumption which arises in the absence of express agreement.

[2] *Kalendarium* = *liber pecuniae creditae foenebris, Index nominum et usurarum debitarum.* Dirksen.

[3] Sc. *credendo*, obviously not *exigendo*.

[4] There are two reasons for this: 1st, they cannot sue Stichus as a co-heir, for he did not take payment in that capacity, not even knowing that he was an heir: 2nd, leaving his ignorance or knowledge out of the question, he *could* possibly have secured his own rights without interfering with the affairs of his co-heirs, for he could have taken payment of his own proportion, and left them to exact theirs. Hence, we can apply the rule in D. 10. 3. 6. 2, that proceedings by *communi dividundo* (and of course by *familiae erciscundae* also) cannot be taken unless something

sed negotiorum gestorum dari debere. quas uero pecunias ipse credidisset, eas non ex maiore parte, quam ex qua ipse heres sit, alienatas esse: nam et si tibi in hoc dederim nummos, ut eos Sticho credas, deinde mortuo me ignorans dederis, accipientis non facies: neque enim sicut illud receptum est, ut debitores soluentes ei liberentur, ita hoc quoque receptum, ut credendo nummos alienaret. quare si nulla stipulatio interuenisset, neque ut creditam pecuniam pro parte coheredis peti posse neque pignora teneri. quod si stipulatus quoque esset, referret, quemadmodum stipulatus esset: nam si nominatim forte Titio domino suo mortuo iam dari stipulatus sit, procul dubio inutiliter esset stipulatus. quod si sibi dari stipulatus esset, dicendum hereditati eum adquisisse: sicut enim nobis-

granted to them. And with regard to the sums which he had lent, these had not been alienated to a greater extent than the proportion for which he was heir[1]: for even if I give you money in order that you may lend it to Stichus, and thereupon you give it, not knowing that I have died, you will not make the money the property of the recipient[2]; for although it is allowed that the debtors who pay Stichus are absolved, it is not also allowed that Stichus alienates money by lending it. Therefore, if no stipulation was interposed, there cannot be a suit for money lent, nor retention of the pledges, on account of a coheir's proportion. But if he added a stipulation, it would be material in what manner he stipulated. For if he stipulated expressly for it to be given to his master, Titius suppose, who was already dead, undoubtedly he made a void stipulation[3]. But if he stipulated for it to be given to himself, we must decide that he has acquired it for the inheritance[4]; for just as

has been done by a partner (or coheir) without doing which he could not adequately guard his own interests.

[1] This is all that need be stated for the present argument: but Africanus might have added that he did not even alienate his own share, as he acted in ignorance that it belonged to him. D. 41. 1. 35; D. 12. 4. 3. 8.

[2] The mandate is revoked by the death of the giver of it. Just. *Inst.* 3. 26. 10: D. 17. 1. 26. *pr.* and 1.

[3] When a stipulation is for Titius, it is a tacit implication that Titius is alive and can take, therefore if Titius be already dead, the implied condition is not in suspense, but void. See § 37 above.

[4] He is part of the inheritance, or at any rate in good faith considers himself part of the inheritance, till he is informed that he is

met ipsis ex re nostra per eos, qui liberi uel alieni serui bona fide seruiant, adquiratur, ita hereditati quoque ex re hereditaria adquiri. post aditam uero a coheredibus hereditatem non aeque idem dici potest, utique si scierint eum sibi coheredem datum, quoniam tunc non possunt uideri bonae fidei possessores esse, qui nec possidendi animum haberent. quod si proponatur coheredes eius id ignorasse, quod forte ipsi quoque ex necessariis fuerint, potest adhuc idem responderi: quo quidem casu illud euenturum, ut, si suae condicionis coheredes iste seruus habeat, inuicem bona fide seruire uideantur.

42. Celsus libro sexto digestorum. Si ego decem stipulatus a Titio deinceps stipuler a Seio, quanto minus a Titio consequi possim: si decem petiero a Titio, non liberatur Seius, alioquin nequicquam mihi cauetur: at si iudicatum fecerit

acquisition is made for ourselves in connection with our substance by means of those persons, whether free or the slaves of other people, who are serving us in good faith, so also is acquisition made for the inheritance in connection with an item of the inheritance. But after his co-heirs have made entry on the inheritance, the same cannot be laid down as before, at any rate if they knew that he was appointed their co-heir; for then they cannot be considered to be possessors in good faith, since they had no intention of possessing[1]. But if it be supposed that his co-heirs were ignorant, because, perhaps, they too were *heredes necessarii*, the same rule can still be laid down. On which hypothesis this also will be a result, that when such a slave has co-heirs of the same condition as himself, they in their turn would seem to serve him in good faith.

42. *Celsus*[2]. If, after stipulating with Titius for ten *aurei*, I afterwards stipulate with Seius for the deficiency of what I can obtain from Titius; then, supposing I sue Titius for ten, Seius is not acquitted, for otherwise his engagement

free. He therefore acquires for the inheritance, as a freeman acquires for one whom he believes to be his master. It is also *ex operis suis*, for he is by vocation a *dispensator*.

[1] Sc. of possessing Stichus. If they did not know, Stichus acquires for the inheritance, and the inheritance appertains to them. This is what is meant in the next sentence too, "*potest adhuc idem responderi*." There is a presumption that a slave knows nothing: "*servus nescit quod faciat dominus eius*."

[2] This excerpt should be placed under D. 45. 1, *De verborum obligationibus*.

Titius, nihil ultra Seius tenebitur. sed si cum Seio egero, quantumcumque est quo minus a Titio exigere potuero eo tempore, quo iudicium inter me et Seium acceptum est, tanto minus a Titio postea petere possum. (1.) Labeo ait, cum decem *dari curari* stipulatus sis, ideo non posse te decem dare oportere intendere, quia etiam reum locupletiorem dando promissor liberari possit: quo scilicet significat non esse cogendum eum accipere iudicium, si reum locupletem offerat.

would be of no value to me; although if Titius has paid the amount adjudged, Seius will not be liable for any thing further. But if I sue Seius for the deficiency of the amount which I can exact from Titius at the time when the suit is instituted between Seius and myself, I can afterwards only sue Titius for so much less. 1. Labeo says, that when you have stipulated that ten *aurei* "shall be caused to be given[1]," you cannot plead that ten ought to be given, because the promiser can acquit himself also by providing a wealthy defendant[2]; by which, undoubtedly, he intends to say that he need not defend the suit, if he provides a rich defendant.

[1] There is a considerable variation of reading in the MSS., some having *dari* alone, others *curari* alone, others *curari dari*, others *dari curari*. The last appears the most trustworthy, for in D. 45. 1. 67. Ulpian writes: "eum qui decem *dari sibi curari* stipulatus sit," and a little further on adds, "idque et Celsus libro sexto Digestorum refert." So that he seems to be quoting the very passage in the text.

[2] Sc. as well as by paying the money. Therefore there is a *plus petitio ex causâ*, if you take from him his option. Gai. *Comm.* 4. 53. *a*.

DE CONDICTIONE CAUSA DATA CAUSA NON SECUTA.

D. 12. 4.

1. Ulpianus libro uicensimo sexto ad edictum. Si ob rem non inhonestam data sit pecunia, ut filius emanciparetur uel seruus manumitteretur uel a lite discedatur, causa secuta repetitio cessat. (1.) Si parendi condicioni causa tibi dedero decem, mox repudiauero hereditatem uel legatum, possum condicere.

2. Hermogenianus libro secundo iuris epitomarum. Sed et si falsum testamentum sine scelere eius qui dedit uel inofficiosum pronuntietur, ueluti causa non secuta decem repetentur.

1. *Ulpian.* If money has been given for a purpose which is not improper, that a son, for instance, may be emancipated, or a slave manumitted, or a suit abandoned, recovery is not allowed when the purpose has been carried out. 1. If I give you ten *aurei* in order that I may comply with a condition[1], and afterwards decline the inheritance or legacy, I can bring a condiction.

2. *Hermogenian.* So too if a testament be declared false or inofficious without fault on the part of the man who gave the money, the ten *aurei* can be recovered on the ground of the purpose not having been effected.

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[1] He complies with a condition which will entitle him to the offer of the inheritance, not with one which actually makes him heir: if he had once complied with a condition of the last mentioned purport, his opportunity of renouncing the inheritance would have been lost. D. 28. 5. 86. *pr.* : D. 35. 1. 5.

3. Ulpianus libro uicensimo sexto ad edictum. Dedi tibi pecuniam, ne ad iudicem iretur: quasi decidi. an possim condicere, si mihi non caueatur ad iudicem non iri? et est uerum multum interesse, utrum ob hoc solum dedi, ne eatur, an ut et mihi repromittatur non iri: si ob hoc, ut et repromittatur, condici poterit, si non repromittatur: si ut ne eatur, condictio cessat quamdiu non itur. (1.) Idem erit et si tibi dedero, ne Stichum manumittas: nam secundum distinctionem supra scriptam aut admittenda erit repetitio aut inhibenda. (2.) Sed si tibi dedero, ut Stichum manumittas: si non facis, possum condicere, aut si me poeniteat, condicere possum. (3.) Quid si

3. *Ulpian.* I gave you money in order that a case might not go on to a hearing, (but be) as if I had made a compromise[1]. Can I bring a condiction for the money, if sureties are not provided that the case shall not go on to a hearing? We must hold that it makes a great difference whether I gave you money solely on consideration that the case should not proceed, or on consideration that sureties also should be given me for the case not proceeding: if for the latter consideration, viz. that sureties also should be given, there can be a condiction, supposing the sureties are not furnished; if on consideration that the case should not proceed, the condiction cannot be brought, so long as there is no further proceeding. 1. So also will it be if I have given you money not to manumit Stichus; for recovery will be allowed to me or forbidden, in accordance with the above-named distinction. 2. But supposing I have given you money to manumit Stichus: if you do not do it[2], I can bring the condiction; or if I change my mind, I can bring the condiction. 3. But

[1] There was not formality enough in what was done to constitute a *transactio;* if there had been, the *transactio* could have been pleaded as an exception; but we simply agreed that I should have the same advantage as if there had been a *transactio*, and I paid you money on this consideration: and though I could not resist your suit, I could recover my money if you brought it. Gothofred, however, takes *quasi* in a different sense and translates: I gave you money, &c., *that is I made a compromise with you.*" But if there was a binding compromise, then, as stated above, it could be pleaded as an exception, and so the payer of the money had got his *causa*, viz. protection against a suit.

[2] Sc. if you do not do it after receiving formal notice from me to carry out your agreement. No one was *in mora* till he received notice, unless in his agreement a time was mentioned; then, however, *tempus interpellat pro homine.*

ita dedi, ut intra certum tempus manumittas? si nondum tempus praeteriit, inhibenda erit repetitio, nisi poeniteat: quod si praeteriit, condici poterit. sed si Stichus decesserit, an repeti quod datum est possit? Proculus ait, si post id temporis decesserit, quo manumitti potuit, repetitionem esse, si minus, cessare. (4.) Quin immo et si nihil tibi dedi, ut manumitteres, placuerat tamen, ut darem, ultro tibi competere actionem, quae ex hoc contractu nascitur, id est condictionem defuncto quoque eo. (5.) Si liber homo, qui bona fide seruiebat, mihi pecuniam dederit, ut eum manumittam, et fecero: postea liber probatus an mihi condicere possit, quaeritur. et Iulianus libro undecimo digestorum scribit competere manumisso repetitionem. Neratius etiam libro membranarum refert Paridem pantomimum a Domitia Neronis filia decem, quae ei pro libertate dederat,

what if I have given you it to manumit him within a certain time? If the time has not yet expired, recovery will be forbidden, unless I change my mind: but if the time has expired, there can be a condiction. But if Stichus be dead, can the money which was given be recovered? Proculus says that recovery is allowable, if he died after the time when he could have been manumitted[1], but not otherwise. 4. Nay further, even if I gave you nothing to manumit him, but we agreed[2] that I should give something, still the action which arises under this contract, i.e. the condiction, can be brought by you, although he be dead. 5. If a free man, whilst serving me in good faith, gave me money to set him free, and I did so; it is asked whether he can sue me, if afterwards he has been proved a free man. And Julian in the eleventh book of his *Digests*, says, that the manumitted man is able to recover[3]. Neratius also in his book of *Membranæ* relates that Paris, the actor, recovered before a *judex* from Domitia, the daughter of Nero, ten *aurei*,

[1] For then the promiser is *in mora*.

[2] Savigny points out that "placuerat" implies more than a mere agreement, for immediately afterwards a *contract* is mentioned: hence the agreement must have been by stipulation, and the condiction always arises on a formal contract. Sav. *Rom. Recht.* App. XIV. § 26.

[3] Sc. by *condictio causa data causa non secuta*. He gave money for freedom, but he had it already, and a man cannot receive what he has already got. Still he has a condiction, for though the consideration in view is impossible, he thought it possible, believing himself a slave. See C. 4. 6. 6.

repetisse per iudicem nec fuisse quaesitum, an Domitia sciens liberum accepisset. (6.) Si quis quasi statuliber mihi decem dederit, cum iussus non esset, condicere eum decem Celsus scribit. (7.) Sed si seruus, qui testamento heredi iussus erat decem dare et liber esse, codicillis pure libertatem accepit et id ignorans dederit heredi decem, an repetere possit? et refert patrem suum Celsum existimasse repetere eum non posse: sed ipse Celsus naturali aequitate motus putat repeti posse. quae sententia uerior est, quamquam constet, ut et ipse ait, eum qui dedit ea spe, quod se ab eo qui acceperit remunerari existimaret uel amiciorem sibi esse eum futurum, repetere non posse opinione falsa deceptum. (8.) Suptilius quoque illud tractat, an ille, qui se statuliberum putauerit, nec fecerit nummos accipientis, quoniam heredi dedit quasi ipsius heredis nummos daturus, non

which he had given her for his freedom, and the question was not raised whether Domitia had taken the money with knowledge that he was free[1]. 6. If any one has given me ten *aurei*, thinking that he is to have his freedom on that condition, whereas he was never directed to do this, Celsus says he can bring a condiction. 7. But if a slave, who has been ordered in a testament to give ten *aurei* to the heir and have his freedom, has received an absolute gift of freedom in a codicil, and not knowing the latter fact, has paid the ten *aurei* to the heir, can he recover it? And he records that his father Celsus thought he could not recover; but Celsus himself, following natural equity, thinks he can: and this opinion is the more correct one, although it is well-established, as Celsus himself also says, that any one who has given with the hope and thought that he will be rewarded by the receiver, or that the receiver will be a better friend to him[2], cannot recover, if he is deceived by a false expectation. 8. He also discusses minutely this question, whether the man who believed he was to be free on condition[3], did not fail to make the money the property of the receiver; for he gave it to the heir on the

[1] The decision went against her on the mere ground that she had taken money to do what she could not possibly do.

[2] The expectation is not communicated to the other, and therefore is no part of the contract: it is also too vague, even if communicated.

[3] Sc. on the condition of giving 10 *aurei*. Ulpian is still discussing the case stated in 12. 4. 3. 7.

quasi suos, qui utique ipsius fuerunt, adquisiti scilicet post libertatem ei ex testamento competentem. et puto, si hoc animo dedit, non fieri ipsius: nam et cum tibi nummos meos quasi tuos do, non facio tuos. quid ergo, si hic non heredi, sed alii dedit, cui putabat se iussum? si quidem peculiares dedit, nec fecit accipientis: si autem alius pro eo dedit aut ipse dedit iam liber factus, fient accipientis. (9.) Quamquam permissum sit statulibero etiam de peculio dare implendae condicionis causa, si tamen uult heres nummos saluos facere, potest eum uetare dare: sic enim fiet, ut et statuliber perueniat ad libertatem quasi impleta condicione cui parere prohibitus est, et

supposition that he was giving him his own (the heir's) money, and not the donor's, although all the same it was the donor's, having been acquired, let us suppose, after liberty had accrued to him by the testament. And I think, if he gave it under this impression, it does not become the heir's. For in the case also where I give you my own money, thinking it to be yours, I do not make it yours[1]. What then if he gave it, not to the heir, but to some other person, to whom he thought he was ordered (to give it)? If he gave money out of his *peculium*, he did not make it the property of the receiver; but if, after he became free[2], some other person gave it on his behalf, or if he himself gave it, it will become the property of the receiver. 9. Although a *statuliber* has received permission[3] to pay the money out of his *peculium* to fulfil the condition (of his freedom), yet the heir, if he wishes to retain the money, can forbid him to pay it: for then the result will be that the *statuliber* will arrive at freedom, the condition being regarded as fulfilled when he is forbidden to carry it out[4], and the money will not be lost.

[1] There must be consent between the parties as to the transfer of ownership: one must wish to part with ownership and confer it on the other; that other must wish to receive it as a new property. See D. 41. 1. 35: D. 18. 1. 15. 2.

[2] Pothier says *liber factus* refers to the whole of the words immediately preceding, the meaning being "if he was freed first, and then either procured the money from a stranger and gave it, or gave it out of his own property." So also Accursius.

[3] Se. in the testament.

[4] The law always favours liberty, and therefore in the present case will not allow the *statuliber* to be defrauded of his freedom. The condition, which he is unable to fulfil because of the heir's prohibition, is treated as fulfilled, in accordance with the general principle "jure civili receptum est quoties per eum, cujus interest conditionem (non) impleri, fit quominus impleatur, ut perinde habeatur ac si impleta conditio fuisset." D. 35. 1. 24. Compare D.

nummi non peribunt. sed is, quem testator accipere uoluit, aduersus heredem in factum actione agere potest, ut testatori pareatur.

4. IDEM libro trigensimo nono ad edictum. Si quis accepto tulerit debitori suo, cum conueniret ut expromissorem daret, nec ille det, potest dici condici posse ei qui accepto sit liberatus.

5. IDEM libro secundo disputationum. Si pecuniam ideo acceperis, ut Capuam eas, deinde parato tibi ad proficiscendum condicio temporis uel ualetudinis impedimento fuerit, quo minus proficiscereris, an condici possit, uidendum: et cum per te non steterit, potest dici repetitionem cessare: sed cum liceat poenitere ei qui dedit, procul dubio repetetur id quod datum est, nisi forte tua intersit non accepisse te ob hanc

But the person to whom the testator wished it to be given can proceed against the heir by *actio in factum*, that the testator's wish may be carried into effect.

4. *Ulpian.* When a man has given an acceptilation to his debtor in consideration of his agreement to provide an *expromissor*, and he does not provide one, we may lay down that he who was released by acceptilation is liable to a condiction[1].

5. *Ulpian.* If you have received money to undertake a journey to Capua, and when you were prepared to set out, the state of the weather or of your health prevented you from starting, we must consider whether there can be a condiction: and since it was not your fault, it may be said that recovery is barred; but as the donor has the right to change his mind, it is clear that what was given can be recovered, unless perchance it would have been better for you not to have received money

35. 1. 81. 1: "tunc demum pro impleta habetur conditio, quum per eum stat qui, si impleta esset, debiturus erat," and D. 50. 17. 39: "in omnibus causis pro facto accipitur id in quo per alium mora sit quominus fiat."

[1] The condiction allowed is not a condiction on the original stipulation; for that has been destroyed by the acceptilation: but the condiction granted is one *causa data causa non secuta*, to revoke the acceptilation. Then, the parties being under the original contract, a *condictio certi* can be brought, if the stipulation is not carried into effect. This explanation accords with what Bartolus says: "si causa propter quam debitor liberatur non impletur, agitur ut in pristinam obligationem reponatur." To this view Gothofred assents.

causam pecuniam. nam si ita se res habeat, ut, licet nondum profectus sis, ita tamen rem composueris, ut necesse habeas proficisci, uel sumptus, qui necessarii fuerunt ad profectionem, iam fecisti, ut manifestum sit te plus forte quam accepisti erogasse, condictio cessabit: sed si minus erogatum sit, condictio locum habebit, ita tamen, ut indemnitas tibi praestetur eius quod expendisti. (1.) Si seruum quis tradiderit alicui ita, ut ab eo intra certum tempus manumitteretur, si poenituerit eum qui tradiderit et super hoc eum certiorauerit et fuerit manumissus post poenitentiam, attamen actio propter poenitentiam competit ei qui dedit. plane si non manumiserit, constitutio succedit facitque eum liberum, si nondum poenituerat eum qui in hoc dedit. (2.) Item si quis dederit Titio decem, ut seruum emat et manumittat, deinde poeniteat, si quidem nondum

on this account. For if the state of the case is that although you had not started, you had nevertheless made arrangements which caused your journey to be a necessity, or had already incurred expenses necessary to your setting forth, so that it is clear that you had spent more perhaps than you had received, the condiction cannot be brought; but if a smaller amount has been spent the condiction will be allowed, provided only that you are indemnified for what you have spent. 1. Supposing any one has delivered a slave to another on the understanding that he was to be manumitted within a certain time, if the one who delivered the slave has changed his mind and notified this to the other[1], and the slave has been manumitted after his change of mind, an action can still be brought by the donor[2], because of his change of mind. Obviously, if he has not manumitted him, the Constitution applies[3] and makes the slave free, if the man who gave him for that purpose has not yet changed his mind. 2. So too, if any one has given Titius ten *aurei* to buy a slave and manumit him, and subsequently

[1] Sc. within the time specified.

[2] The action can either be for compensation or for the slave; and the slave can be delivered, since he is still a slave, the form of manumission being of no avail when performed without authority of the owner. D. 40. 2. 4. *pr.*

[3] Sc. the Constitution of Marcus (see D. 40. 8), which provided that a slave, alienated in order that he might be manumitted, should become free by operation of law so soon as the time had expired within which the manumission ought to have taken place.

emptus est, poenitentia dabit condictionem, si hoc ei manifestum fecerit, ne si postea emat, damno adficietur: si uero iam sit emptus, poenitentia non facit iniuriam ei qui redemit, sed pro decem quae accepit ipsum seruum quem emit restituet aut, si ante decississe proponatur, nihil praestabit, si modo per eum factum non est. quod si fugit nec culpa eius contigit qui redemit, nihil praestabit: plane repromittere eum oportet, si in potestatem suam peruenerit, restitutum iri. (3.) Sed si accepit pecuniam ut seruum manumittat, isque fugerit prius quam manumittatur, uidendum, an condici possit quod accepit. et si quidem distracturus erat hunc seruum et propter hoc non distraxit, quod acceperat ut manumittat, non oportet ei condici: plane cauebit, ut, si in potestatem suam peruenerit seruus, restituat id quod accepit eo minus, quo uilior seruus factus est propter fugam. plane si adhuc eum manumitti uelit is qui

changes his mind, the change of mind will give ground for a condiction, if the slave has not yet been bought; provided he made it known to the other, to prevent him from incurring loss by purchasing the slave afterwards; but if he has been already bought, the change of mind does no injury to the purchaser, but instead of (returning) the ten *aurei* which he received, he will deliver up the slave whom he bought, or, if we suppose the slave to be dead previously, he will pay nothing; provided only the death was not through his fault. And if the slave has run away, and this has happened through no fault of the purchaser, the latter will pay nothing; though he ought certainly to undertake that he shall be handed over, if he shall come into his power. 3. But if he received money to manumit a slave (of his own)[1], and the slave ran away before he could be manumitted, we must consider whether a condiction[2] can be brought for what he received. And if he was intending to sell this slave, and did not sell him because he had received money to set him free, a condiction ought not to be brought against him; though certainly he must give security, that if the slave returns into his power, he will restore what he received, less the amount by which the slave has been depreciated in value by his running away. Obviously, if the man

[1] Pothier inserts the word *proprium*. There is no MS. authority for it, but it undoubtedly expresses the meaning of Ulpian.

[2] Sc. *causa data causa non secuta, ex poenitentia.*

dedit, ille uero manumittere nolit propter fugam offensus, totum quod accepit restituere eum oportet. sed si eligat is, qui decem dedit, ipsum seruum consequi, necesse est aut ipsum ei dari aut quod dedit restitui. quod si distracturus non erat eum, oportet id quod accepit restitui, nisi forte diligentius eum habiturus esset, si non accepisset ut manumitteret: tunc enim non est aequum eum et seruo et toto pretio carere. (4.) Sed ubi accepit, ut manumitteret, deinde seruus decessit, si quidem moram fecit manumissioni, consequens est, ut dicamus refundere eum quod accepit: quod si moram non fecit, sed cum profectus esset ad praesidem uel apud quem manumittere posset, seruus in itinere decesserit, uerius est, si quidem distracturus erat uel quo ipse usurus, oportere dici nihil eum refundere debere. enimuero si nihil eorum facturus, ipsi adhuc seruum obisse: decederet enim et si non accepisset ut manumitteret: nisi forte profectio manumissionis gratia morti causam praebuit, ut uel a latronibus sit interfectus, uel

who gave the money still wishes him to be manumitted, and the other will not manumit him through anger at his running away, he must restore the whole of what he received. But if the giver of the ten *aurei* elects to have the slave himself, it is necessary that either the slave shall be given to him or the money which he gave be returned. But if the receiver of the money had no intention of selling him, what he received must be returned, unless perhaps he would have kept him more carefully, if he had not received money to manumit him; for then it is not right that he should lose both the slave and the whole of the price. 4. But supposing he received money to manumit him, and afterwards the slave died; if he made delay in manumitting him, it is consistent to lay down that he has to restore what he received; but if he made no delay, and the slave died on his journey when he was on his way to the Prefect or the person before whom the master could manumit him, it is more correct to rule that, if the master intended to sell him or to use him himself in any way, we must say that he need refund nothing. If, however, he was not intending to do anything of the sort, the slave died whilst still at his risk: for he would have died, even though he had received nothing to manumit him; unless indeed the journey for the purpose of manumission caused his death, supposing that he was either

ruina in stabulo oppressus, uel uehiculo obtritus, uel alio quo modo, quo non periret, nisi manumissionis causa proficisceretur.

6. IDEM libro tertio disputationum. Si extraneus pro muliere dotem dedisset et pactus esset, ut, quoquo modo finitum esset matrimonium, dos ei redderetur, nec fuerint nuptiae secutae, quia de his casibus solummodo fuit conuentum qui matrimonium sequuntur, nuptiae autem secutae non sint, quaerendum erat, utrum mulieri condictio an ei qui dotem dedit competat. et uerisimile est in hunc quoque casum eum qui dat sibi prospicere: nam quasi causa non secuta habere potest condictionem, qui ob matrimonium dedit, matrimonio non copulato, nisi forte euidentissimis probationibus mulier ostenderit hoc eum ideo fecisse, ut ipsi magis mulieri quam sibi prospiceret. sed et si pater pro filia det et ita conuenit, nisi euidenter aliud actum sit, condictionem patri competere Marcellus ait.

killed by robbers, or crushed by the fall of something at an inn, or run over by a cart, or destroyed in any other way, in which he would not have been destroyed but for being on the journey for manumission.

6. *Ulpian.* When a stranger had given a marriage-portion on behalf of a woman, and had made a pact that, in whatever way the marriage came to an end, the portion should be returned to him; and no marriage ensued: since the pact only referred to events consequent on a marriage, and a marriage never took place, it was questionable whether the condiction would avail for the woman or for him who gave the portion. And it seems probable that the giver in this case too[1] intends his own benefit: for he can have a condiction on the ground of "purpose unattained," since he gave in view of marriage, and no marriage took place; unless indeed the woman shews by the clearest proofs that he acted with intent to benefit her rather than himself. And even if a father gives on behalf of his daughter and there is a pact of the kind, Marcellus says the condiction is allowed to the father, unless the contrary intent is evident.

[1] Sc. the case of no marriage ever taking place.

7. IULIANUS libro sexto decimo digestorum. Qui se debere pecuniam mulieri putabat, iussu eius dotis nomine promisit sponso et soluit: nuptiae deinde non intercesserunt: quaesitum est, utrum ipse potest repetere eam pecuniam qui dedisset, an mulier. Nerua, Atilicinus responderunt, quoniam putasset quidem debere pecuniam, sed exceptione doli mali tueri se potuisset, ipsum repetiturum. sed si, cum sciret se nihil mulieri debere, promisisset, mulieris esse actionem, quoniam pecunia ad eam pertineret. si autem uere debitor fuisset et ante nuptias soluisset et nuptiae secutae non fuissent, ipse possit condicere, causa debiti integra mulieri ad hoc solum manente, ut ad nihil aliud debitor compellatur, nisi ut cedat ei condicticia actione. (1.) Fundus dotis nomine traditus, si nuptiae insecutae non fuerint, condictione repeti potest: fructus quoque condici poterunt. idem iuris est de ancilla et partu eius.

8. NERATIUS libro secundo membranarum. Quod Seruius in libro de dotibus scribit, si inter eas personas, quarum altera

7. *Julian.* A person, who believed himself to be in debt to a woman, by her order promised money as a marriage-portion to her betrothed, and paid it; thereafter the marriage did not ensue; it was asked whether he who gave the money can recover it, or the woman. Nerva and Atilicinus held that as he only thought that he owed the money and could have protected himself by an *exceptio doli mali*, he himself can recover it. But if he had promised, knowing that he owed the woman nothing, the action could be brought by the woman, because the money would belong to her[1]. But if he was really her debtor, and paid in contemplation of her marriage, and the marriage never took place, he can himself bring the condiction; the condition of indebtedness to the woman continuing to exist only to this extent, that the debtor can be compelled merely to cede to her his *actio condictitia*. 1. A field delivered by way of marriage-portion can, if no marriage ensues, be recovered by condiction: fruits also can come into the condiction. The rule is also the same as to a female slave and her offspring.

8. *Neratius.* When Servius states, in his work *De Dotibus*,

[1] Practically, he gave her the money, when he promised knowing that he did not owe it Hence, having transferred ownership, he cannot himself sue, and is under no obligation except to transfer the actions which are appurtenant to his ownership.

nondum iustam aetatem habeat, nuptiae factae sint, quod dotis nomine interim datum sit, repeti posse, sic intellegendum est, ut, si diuortium intercesserit, priusquam utraque persona iustam aetatem habeat, sit eius pecuniae repetitio, donec autem in eodem habitu matrimonii permanent, non magis id repeti possit, quam quod sponsa sponso dotis nomine dederit, donec maneat inter eos adfinitas: quod enim ex ea causa nondum coito matrimonio datur, cum sic detur tamquam in dotem peruenturum, quamdiu peruenire potest, repetitio eius non est.

9. Paulus libro septimo decimo ad Plautium. Si donaturus mulieri iussu eius sponso numeraui, nec nuptiae secutae sunt, mulier condicet. sed si ego contraxi cum sponso et pecuniam in hoc dedi, ut, si nuptiae secutae essent, mulieri dos adquireretur, si non essent secutae, mihi redderetur, quasi ob rem datur et re non secuta ego a sponso condicam. (1.) Si quis indebitam pecuniam per errorem iussu mulieris sponso

that if a marriage has taken place between two persons, one of whom has not yet attained to lawful age, whatever has been given meantime as a marriage-portion can be recovered,—his statement is to be understood thus, that if a divorce takes place before both the parties have attained to lawful age, there can be recovery of the money; but so long as they continue in the same condition of matrimony, the money can no more be recovered than that money can which a betrothed woman has given to her betrothed husband by way of marriage-portion, so long as the engagement between them continues. For whatever is given to this end before marriage takes place, cannot be recovered, since it has been given to form a marriage portion, so long as the marriage may possibly take place.

9. *Paulus.* When, with intent to make a gift to a woman, I have paid money by her direction to her betrothed husband, and the marriage has not ensued, the woman will have the condiction for it. But if I made a contract with the betrothed husband, and gave money with the intent that it should become the woman's marriage portion, if the marriage ensued, and should be restored to me, if the marriage did not ensue, I shall have the condiction against the betrothed husband on the ground of its being given for a purpose and the purpose not having been accomplished. 1. If any one has by mistake, upon the request of a woman, promised to her betrothed hus-

eius promississet et nuptiae secutae fuissent, exceptione doli mali uti non potest: maritus enim suum negotium gerit et nihil dolo facit nec decipiendus est: quod fit, si cogatur indotatam uxorem habere. itaque aduersus mulierem condictio ei competit, ut aut repetat ab ea quod marito dedit aut ut liberetur, si nondum soluerit. sed si soluto matrimonio maritus peteret, in eo dumtaxat exceptionem obstare debere, quod mulier receptura esset.

10. Iavolenus libro primo ex Plautio. Si mulier ei cui nuptura erat cum dotem dare uellet, pecuniam quae sibi debebatur acceptam fecit neque nuptiae insecutae sunt, recte ab eo pecunia condicetur, quia nihil interest, utrum ex numeratione pecunia ad eum sine causa an per acceptilationem peruenerit.

band a sum of money which is not due to her, and marriage has ensued, he cannot avail himself of the exception of fraud. For the husband acts in pursuance of his own interest and does nothing fraudulent, and he ought not to be defrauded, as he would be, if compelled to take the wife without the portion. Therefore the condiction is to be brought by him against the woman, so that he may either recover from her what he gave to her husband, or receive an acquittance, if he has not yet paid. But if the husband sues for the money after the marriage has been dissolved, the exception[1] ought only to stand good against him in respect of the proportion which his wife could have reclaimed (from the marriage portion).

10. *Javolenus.* If a woman, wishing to give a marriage-portion to the man whom she is about to marry, has acquitted him from a debt which he owed her, and then the marriage has not ensued, a condiction can lawfully be brought against him for the money, because it is immaterial whether it was by payment or by acceptilation that the money came to him without consideration[2].

[1] Sc. *exceptio doli mali*. As to the portion of the *dos* to which husband and wife respectively were entitled, see Ulpian. 6. 9—17.

[2] This clearly implies that the acceptilation is good, so that there is no suit on the old obligation. But as the acceptilation was given for a consideration which has failed, there is a *condictio causa data causa non secuta*, to reverse the acceptilation and put the parties on their old footing. Hence, the passage seems at first sight to contradict D. 23. 3. 43. *pr.* where Scaevola says: "matrimonii causa acceptilationem interpositam

11. Iulianus libro decimo digestorum. Si heres arbitratu liberti certa summa monumentum iussus facere dederit liberto pecuniam, et is accepta pecunia monumentum non faciat, condictione tenetur.

12. Paulus libro sexto ad legem Iuliam et Papiam. Cum quis mortis causa donationem, cum conualuisset donator, condicit, fructus quoque donatarum rerum et partus et quod adcreuit rei donatae repetere potest.

13. Marcianus libro tertio regularum. Si filius contulerit fratri quasi adgniturus bonorum possessionem et non adgnouit, repetere eum posse Marcellus libro quinto digestorum scribit.

14. Paulus libro tertio ad Sabinum. Si procuratori falso indebitum solutum sit, ita demum a procuratore repeti non potest, si dominus ratum habuerit, sed ipse dominus tenetur,

11. *Julian.* If an heir, directed to set up a monument at such cost as a freedman shall think proper, has given the money to the freedman, the latter, if he does not erect the monument after receiving the money, is liable to the condiction.

12. *Paulus.* When the giver of a donation *mortis causa*, having recovered his health, brings a condiction for the gift[1], he can reclaim also the fruits of what was given, and the offspring, and any accession to it.

13. *Marcianus.* If a son[2] has thrown his goods into community with his brother, intending to claim *bonorum possessio*, and then has not claimed it, Marcellus in the 5th Book of his *Digests* writes that he can recover them.

14. *Paulus.* If money not really due be paid to a pretended agent, it is recoverable from the pretended agent, except when the principal has ratified his act; and then the

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non secutis nuptiis nullam esse." But, though Javolenus is technically correct, still, because of the *condictio causa data causa non secuta*, the result is *the same as if* the acceptilation were void. Or, if this explanation is unsatisfactory, we may suggest that Scaevola refers to a conditional acceptilation, "if the marriage takes place," Javolenus to an absolute acceptilation, but proveable to have been made in consideration of the marriage.

[1] Sc. *ex poenitentia.*

[2] An emancipated son must be meant, who was allowed to claim *bonorum possessio* on condition of bringing in his own property for division with his father's. D. 37. 6.

ut Iulianus scribit. quod si dominus ratum non habuisset, etiamsi debita pecunia soluta fuisset, ab ipso procuratore repetetur: non enim quasi indebitum datum repetetur, sed quasi ob rem datum nec res secuta sit ratihabitione non intercedente: uel quod furtum faceret pecuniae falsus procurator, cum quo non tantum furti agi, sed etiam condici ei posse.

15. Pomponius libro uicensimo secundo ad Sabinum. Cum seruus tuus in suspicionem furti Attio uenisset, dedisti eum in quaestionem sub ea causa, ut, si id repertum in eo non esset, redderetur tibi: is eum tradidit praefecto uigilum quasi in facinore depraehensum: praefectus uigilum eum summo supplicio adfecit. ages cum Attio dare eum tibi oportere, quia et ante mortem dare tibi eum oportuerit. Labeo ait posse

principal himself is liable, as Julian states. But if the principal has not ratified, the money can be recovered from the agent himself, even if it was due; for it will not be recovered on the ground that it was never due, but on the ground that it was given for a purpose and the purpose was never executed, as no ratification followed: or because the pretended agent would commit a theft of the money, and so not only can he be proceeded against for theft, but can also be liable to a condiction[1].

15. *Pomponius.* When your slave had been suspected by Attius of stealing from him, you made him over (to Attius) for examination on the matter by torture[2], on condition that if he was not found guilty thereof, he should be restored to you: Attius handed him over to the *Praefectus Vigilum*, as if he had been detected in the act, and the *Praefectus Vigilum* put him to death. You can sue Attius on the ground that he ought to give him to you, because even prior to the slave's death he was bound to restore him to you[3]. Labeo says, it is also possi-

[1] Pothier says, if the payment was made with the intention that the money should be the agent's, but that the principal's ratification should be given, there is a proper occasion for the *condictio causa data causa non secuta*. But if I only gave him the money that he might carry it to his principal, the above-named condiction will not suit the case, but the *condictio furtiva* and *actio furti* will apply. So also Azo and Gothofred.

[2] It is clear that you did not give Attius mere possession, but ownership also; though an agreement was introduced into the contract for a reconveyance to you of the slave after his examination by torture, if it failed to establish his guilt.

[3] Attius did wrong the moment he delivered the slave to the *Praefectus Vigilum*, for that was a breach of the contract. Either he had been examined and not found guilty, or

etiam ad exhibendum agi, quoniam fecerit quo minus exhiberet. sed Proculus dari oportere ita ait, si fecisses eius hominem, quo casu ad exhibendum agere te non posse: sed si tuus mansisset, etiam furti te acturum cum eo, quia re aliena ita sit usus, ut sciret se inuito domino uti aut dominum si sciret prohibiturum esse.

16. Celsus libro tertio digestorum. Dedi tibi pecuniam, ut mihi Stichum dares: utrum id contractus genus pro portione emptionis et uenditionis est an nulla hic alia obligatio est quam ob rem data re non secuta? in quod procliuior sum: et ideo, si mortuus est Stichus, repetere possum quod ideo tibi dedi, ut mihi Stichum dares. finge alienum esse Stichum, sed te tamen eum tradidisse: repetere a te pecuniam potero,

ble to bring an *actio ad exhibendum*, because he made his production of him impossible. But Proculus says, if you made the slave his property, his obligation is to give back the slave; and in that case you cannot sue *ad exhibendum:* but, if he had remained your slave, you could also have proceeded against Attius for theft, because he has used the property of another person in a manner in which he knew the owner did not intend him to use it, and that the owner would have prevented him, if he had known[1].

16. *Celsus.* I gave you money in order that you might give me Stichus; is a contract of this kind an instance of buying and selling, or does no other obligation here arise than that of a gift "for a purpose, and the purpose unfulfilled"? I am inclined to take the view last-mentioned[2], and so, if Stichus be dead, I can recover the money which I gave you in consideration of your giving Stichus to me[3]. Suppose Stichus belonged to some other person, and that you nevertheless delivered him; I can recover the money from you[4], because

by delivering him to the Prefect before examination Attius prevented the examination taking place at all.

[1] Just. *Inst.* 4. 1. 6.

[2] Cujas says there is no sale, because in a sale you would merely undertake "mihi licere habere Stichum"; whereas in the instance before us, you go further, and engage "dare Stichum," or to transfer *actual ownership* to me.

[3] There would be no recovery if the transaction had been a sale. See D. 18. 6, *passim*.

[4] Sc. prior to my eviction. In a sale mere liability to eviction will not be taken into account, but the eviction must actually take place in

qui hominem accipientis non feceris: et rursus, si tuus est Stichus et pro euictione eius promittere non uis, non liberaberis, quo minus a te pecuniam repetere possim.

you did not make the slave the property of the receiver: and again, if Stichus belongs to you, and you will not guarantee me against eviction[1], you will not be clear of the risk of my reclaiming the money from you.

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order that legal proceedings may be instituted.

[1] I have a right to this security, as a part of the *dominium* which you engaged to confer upon me.

DE CONDICTIONE OB TURPEM VEL INIUSTAM CAUSAM.

D. 12. 5.

1. PAULUS libro decimo ad Sabinum. Omne quod datur aut ob rem datur aut ob causam, et ob rem aut turpem aut honestam: turpem autem, aut ut dantis sit turpitudo, non accipientis, aut ut accipientis dumtaxat, non etiam dantis, aut utriusque. (1.) Ob rem igitur honestam datum ita repeti potest, si res, propter quam datum est, secuta non est. (2.) Quod si turpis causa accipientis fuerit, etiamsi res secuta sit, repeti potest:

2. ULPIANUS libro uicensimo sexto ad edictum. ut puta dedi tibi ne sacrilegium facias, ne furtum, ne hominem occidas.

1. *Paulus.* Everything which is given is given either for a purpose or for a reason[1]: and (if for a purpose) for a purpose that is dishonourable or honourable, and (if dishonourable) dishonourable either because the donor only acts dishonourably and not the receiver, or the receiver only and not the donor, or both of them. 1. Hence, that which has been given for an honourable purpose can only be recovered, when the purpose for which it was given has not come to pass[2]. 2. But if the purpose was dishonourable on the side of the receiver, it can be recovered, even though the purpose has come to pass:

2. *Ulpian.* As, for instance, when I have given you money not to commit sacrilege, or theft or murder. And Julian

[1] Sc. in order that something may be done in the future, or because something has been done in the past. See D. 12. 6. 52.

[2] Or has come to pass, though the donor notified, *ex poenitentia*, that he did not desire it to be brought about. D. 12. 4. 5. 1 and 2.

in qua specie Iulianus scribit, si tibi dedero, ne hominem occidas, condici posse: (1.) Item si tibi dedero, ut rem mihi reddas depositam apud te uel ut instrumentum mihi redderes. (2.) Sed si dedi, ut secundum me in bona causa iudex pronuntiaret, est quidem relatum condictioni locum esse: sed hic quoque crimen contrahit (iudicem enim corrumpere uidetur) et non ita pridem imperator noster constituit litem eum perdere.

3. Paulus libro decimo ad Sabinum. Ubi autem et dantis et accipientis turpitudo uersatur, non posse repeti dicimus: ueluti si pecunia detur, ut male iudicetur.

4. Ulpianus libro uicensimo sexto ad edictum. Idem si ob stuprum datum sit, uel si quis in adulterio deprehensus redemerit se: cessat enim repetitio, idque Sabinus et Pegasus responderunt. (1.) Item si dederit fur, ne proderetur, quoniam

says in reference to the last-named example, if I have given you money not to commit a murder, a condiction can be brought for it; (1) and so too if I have given you money to restore to me an article deposited with you, or to deliver up a document. 2. And even if I gave money in order that a *judex* might pronounce in my favour in a case where I was in the right, it has been laid down that the condiction may be brought: but in this instance the donor also is in fault (for he is considered to corrupt the *judex*), and not so very long ago our Emperor decided that the donor lost his suit[1].

3. *Paulus.* But when there is a dishonourable purpose on the part of the giver as well as the receiver, we say that recovery is not possible: when, for instance, money is given to obtain an unfair judgment.

4. *Ulpian.* So too, if it has been given for prostitution, or in order that a man detected in adultery may buy indemnity[2]: for recovery is not allowed, and this was the opinion of Sabinus and Pegasus. 1. So too, if a thief has given money not to be informed against, since there is a dishonourable purpose on

[1] Sc. his suit against the *judex* for recovery of what he had given him. The suitor and the *judex* are equally in fault, and therefore the court can entertain no suit, because "in pari causa possessor potior haberi debetur," D. 50. 17. 128.

[2] This passage is not contradictory to D. 4. 2. 7. 1, although at first view it seems so. The explanation is, that an adulterer who freely pays money cannot recover it, although one who pays under the influence of intimidation can; not, however, by the *condictio*, but by the *actio quod metus causa*.

utriusque turpitudo uersatur, cessat repetitio. (2.) Quotiens autem solius accipientis turpitudo uersatur, Celsus ait repeti posse: ueluti si tibi dedero, ne mihi iniuriam facias. (3.) Sed quod meretrici datur, repeti non potest, ut Labeo et Marcellus scribunt, sed noua ratione, non ea, quod utriusque turpitudo uersatur, sed solius dantis: illam enim turpiter facere, quod sit meretrix, non turpiter accipere, cum sit meretrix. (4.) Si tibi indicium dedero, ut fugitiuum meum indices uel furem rerum mearum, non poterit repeti quod datum est: nec enim turpiter accepisti. quod si a fugitiuo meo acceperis ne eum indicares, condicere tibi hoc quasi furi possim: sed si ipse fur indicium a me accepit uel furis uel fugitiui socius, puto condictionem locum habere.

5. Iulianus libro tertio ad Urseium Ferocem. Si a seruo meo pecuniam quis accepisset, ne furtum ab eo factum

both sides, no recovery is possible. 2. But whenever there is a dishonourable purpose on the part of the receiver only, Celsus says recovery is possible, as, for instance, when I have given money to you in order that you may not commit an injury upon me. 3. And money given to a harlot cannot be recovered, as Labeo and Marcellus state; though they say so for a strange reason, not because there is dishonourable purpose on both sides, but because there is on the part of the giver only; for the woman acts disgracefully in being a harlot, but does not receive disgracefully when she is a harlot. 4. If I have given you a reward[1] to discover my runaway slave or the stealer of my goods, what has been given cannot be recovered: for you have not received it for a disgraceful purpose. But if you received money from my runaway slave not to discover him, for this I can bring a condiction against you as a thief[2]: and so too if the thief himself received from me a reward for information, or if the accomplice of the thief or runaway did so, I think the condiction can be brought[3].

5. *Julian.* If any one received money from my slave not to give information as to a theft committed by him, whether he

[1] *Indicium = praemium delationis.* Dirksen.

[2] I can bring a *condictio furtiva*; for as you knew the slave was a runaway, you also knew that he was giving you my money; or, at any rate, money which was not his own, even if you did not know who was his master.

[3] In this case the condiction is *ob turpem causam.*

indicaret, siue indicasset siue non, repetitionem fore eius pecuniae Proculus respondit.

6. Ulpianus libro octauo decimo ad Sabinum. Perpetuo Sabinus probauit ueterum opinionem existimantium id, quod ex iniusta causa apud aliquem sit, posse condici: in qua sententia etiam Celsus est.

7. Pomponius libro uicensimo secundo ad Sabinum. Ex ea stipulatione, quae per uim extorta esset, si exacta esset pecunia, repetitionem esse constat.

8. Paulus libro tertio quaestionum. Si ob turpem causam promiseris Titio, quamuis, si petat, exceptione doli mali uel in factum summouere eum possis, tamen si solueris, non posse te repetere, quoniam sublata proxima causa stipulationis,

gave information or not, Proculus said, there can be a recovery of the money[1].

6. *Ulpian.* Sabinus constantly defended the opinion of the ancient authorities, who held that there could be a condiction for that which was in anyone's hands for a disgraceful[2] reason. And Celsus takes the same view.

7. *Pomponius.* When a stipulation has been extorted by violence, and the money exacted, it is certain there can be a recovery.

8. *Paulus.* When you have promised something to Titius for a disgraceful reason[3], although you can defeat him by the exception of fraud, or by the *exceptio in factum*, if he sues for it; yet if you have paid it, you cannot recover it; for when the proximate reason (for payment) is removed, viz. the stipulation,

[1] There is no need to employ a condiction at all, unless the money has been consumed; for, as the slave gave money without authority, the master has a *vindicatio* or an *actio ad exhibendum*.

[2] "*Ex injusta*, i.e. turpi, et sic pro eodem ponitur in rubrica." Gothofred.

[3] Gothofred interprets this to mean that there is no recovery of that which has been actually paid for a disgraceful reason: but if he is correct, D. 12. 5. 1. 2: 12. 5. 2: 12. 5. 4. 2: 12. 5. 6: 12. 5. 7: 12. 5. 9 must be incorrect. I should suggest that in all the passages enumerated there is an implication that the payment was not only disgraceful to the receiver, but made upon constraint. Surely, if the payer willingly paid for a disgraceful cause, he is by the mere fact of his willingness tainted with turpitude, and falls under the rule that when both parties act disgracefully there is no condiction.

quae propter exceptionem inanis esset, pristina causa, id est turpitudo, superesset: porro autem si et dantis et accipientis turpis causa sit, possessorem potiorem esse et ideo repetitionem cessare, tametsi ex stipulatione solutum est.

9. IDEM libro quinto ad Plautium. Si uestimenta utenda tibi commodauero, deinde pretium, ut reciperem, dedissem, condictione me recte acturum responsum est: quamuis enim propter rem datum sit et causa secuta sit, tamen turpiter datum est. (1.) Si rem locatam tibi uel uenditam a te uel mandatam ut redderes, pecuniam acceperis, habebo tecum ex locato uel uendito uel mandati actionem: quod si, ut id, quod ex testamento uel ex stipulatu debebas, redderes mihi, pecuniam tibi

which would be void because of the exception, there remains the original reason, viz. something disgraceful: and therefore, if there be a disgraceful reason on the part of both, giver and receiver, the one in possession ought to be preferred, and so there is no recovery even though payment has been made on the ground of the stipulation.

9. *Paulus.* If I have lent you garments for use, and afterwards pay you a price for their restoration, it has been held that I can properly proceed by the condiction: for although the money was given for a purpose, and the purpose was effected, yet the purpose of the gift was disgraceful[1]. 1. If you have received money to deliver a thing let to you, or sold by you, or put into your charge, I shall have against you an *actio ex locato*, or *ex vendito* or *mandati*[2]: but if I gave you money to deliver to me what you owed on account of a testament or a stipulation, there will[3] be a condiction only for the

[1] Disgraceful to the receiver, and to him only, if the payer could not get his property otherwise, and so was constrained to give a bribe, in order to avoid loss.

[2] This means that the action on the *bonae fidei* contract is concurrent with the *condictio*. Paulus cannot mean that the action *ex locato* &c. is the only remedy allowed in each instance, for there was a condiction at any rate in the case of *commodatum*, as Paulus has just stated, and in the case of *depositum*, as Ulpian mentions in 12. 5. 2. 1: and it is difficult to see why, if it is allowed in these cases, it should be refused in the others. Pothier, however, holds that the condiction was not applicable when a lessee, vendor or agent, any one, in fact, under obligation *bonae fidei*, and not *stricti juris*, improperly detained an article: Voet as explicitly states the contrary, and Savigny agrees with Voet.

[3] *Dumtaxat* does not signify that there is no remedy except a condic-

dederim, condictio dumtaxat pecuniae datae eo nomine erit. idque et Pomponius scribit.

money given to you on that account. And so too Pomponius says.

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tion; but the arrangement of the sentence shows that Paulus meant that there was a condiction for the money only, and no recovery of interest, such as there is in a *bonae fidei* action. Still, whichever way we take the statement, it is a correct expression of Roman Law. C. 4. 7. 4. And if there is no recovery of interest, there is a *sponsio tertiae partis;* since the *condictio ob turpem causam* is in such a case also a *condictio certi*.

DE CONDICTIONE INDEBITI.

D. 12. 6.

1. Ulpianus libro uicensimo sexto ad edictum. Nunc uidendum de indebito soluto. (1.) Et quidem si quis indebitum ignorans soluit, per hanc actionem condicere potest: sed si sciens se non debere soluit, cessat repetitio.

2. Idem libro sexto decimo ad Sabinum. Si quis sic soluerit, ut, si apparuisset esse indebitum uel Falcidia emerserit, reddatur, repetitio locum habebit: negotium enim contractum est inter eos. (1.) Si quid ex testamento solutum sit,

1. *Ulpian.* Now let us consider as to a payment made without being due. 1. And it is only when a man pays through ignorance[1] what is not due that he can bring his condiction in this form; but if he pays with knowledge that he does not owe, recovery is not permitted.

2. *Ulpian.* If any one has paid upon condition that the money is to be returned, if it be proved not to be due, or if the Falcidian law shall come into play[2], recovery is allowable: for there is a special agreement between the parties[3]. 1. If a

[1] The ignorance here intended is ignorance of fact. Ignorance of law was not sufficient to give rise to the condiction. See C. 1. 18. 10: "si quis jus ignorans indebitam pecuniam solverit, cessat repetitio; per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est." See also C. 4. 5. 9, D. 50. 17. 53. When however there is ignorance of law, coupled with absence of legal and moral obligation, a condiction can be brought, founded on the latter fact rather than the former. See § 54 below.

[2] Sc. if through the discovery of further debts due from the testator, the heir, after paying the legacies, finds that he retains less than one quarter of the inheritance.

[3] The *condictio indebiti* is based on a quasi-contract; but the condiction here rests on a contract, and is therefore a *condictio certi;* for even if there be no stipulation, the *pactum adjectum* is part of the contract of *mutuum*.

quod postea falsum uel inofficiosum uel irritum uel ruptum apparuerit, repetetur, uel si post multum temporis emerserit aes alienum, uel codicilli diu celati prolati, qui ademptionem continent legatorum solutorum uel deminutionem per hoc, quia aliis quoque legata relicta sunt. nam diuus Hadrianus circa inofficiosum et falsum testamentum rescripsit actionem dandam ei, secundum quem de hereditate iudicatum est.

3. PAPINIANUS libro uicensimo octauo quaestionum. Idem est et si solutis legatis noua et inopinata causa hereditatem abstulit, ueluti nato postumo, quem heres in utero fuisse ignorabat, uel etiam ab hostibus reuerso filio, quem pater obisse falso praesumpserat: nam utiles actiones postumo uel filio, qui hereditatem euicerat, dari oportere in eos, qui legatum perceperunt, imperator Titus Antoninus rescripsit, scilicet quod bonae fidei possessor in quantum locupletior factus est tenetur

payment has been made according to the terms of a testament, which is subsequently proved false, or inofficious, or void, or disannulled, it can be recovered; so too if a debt is discovered after a considerable time, or if a codicil long missing is produced, wherein is contained an ademption of the legacies already paid, or a diminution of them through the circumstance that further legacies are given to other people[1]. For the late Emperor Hadrian directed in a rescript on the subject of an inofficious or false testament, that the action should be granted to him to whom the inheritance was adjudged[2].

3. *Papinian.* The same also is the rule, if some novel and unexpected event has deprived the heir of the inheritance, after he has paid legacies; such, for instance, as the birth of a posthumous child, whom the heir did not know to be conceived, or the return of a son from the enemy, whom his father had falsely supposed to be dead. For the Emperor Titus Antoninus directed in a rescript that *utiles actiones* should be granted to the posthumous child, or to the son who had reclaimed the inheritance, against those who had received a legacy; obviously,

[1] See also C. 4. 5. 7.

[2] The rule was necessary; for the payment had not of necessity been made either by this person, or by any one else on his account. If the testament is disannulled, the *heres scriptus*, who paid, cannot be considered to have been agent for the *heres ab intestato*, as their interests are so clearly adverse. Hence, the latter has only an *utilis actio indebiti*.

nec periculum huiusmodi nominum ad eum, qui sine culpa soluit, pertinebit.

4. PAULUS libro tertio ad Sabinum. Idem diuus Hadrianus rescripsit et si aliud testamentum proferatur.

5. ULPIANUS libro sexto decimo ad Sabinum. Nec nouum, ut quod alius soluerit alius repetat. nam et cum minor uiginti quinque annis inconsulte adita hereditate solutis legatis in integrum restituitur, non ipsi repetitionem competere, sed ei, ad quem bona pertinent, Arrio Titiano rescriptum est.

6. PAULUS libro tertio ad Sabinum. Si procurator tuus indebitum soluerit et tu ratum non habeas, posse repeti Labeo libris posteriorum scripsit: quod si debitum fuisset, non posse repeti Celsus: ideo, quoniam, cum quis procuratorem rerum

on the ground that the possessor in good faith is liable to the extent of his enrichment, and that the risk of such debts ought not to fall upon a man who paid without fault[1].

4. *Paulus.* The late Emperor Hadrian issued a rescript to the same effect for the case where a second testament is produced.

5. *Ulpian.* And it is no new principle for one man to recover what another has paid. For also in the case of a person under twenty-five years of age who is allowed *restitutio in integrum*, after having thoughtlessly taken up an inheritance and paid legacies, a rescript, addressed to Arrius Titianus, directed that recovery shall not be made by him, but by the man on whom the property devolves.

6. *Paulus.* If your agent pays what you do not owe, and you do not ratify his act, Labeo in his *Posteriores* says that he can recover[2]: but if you owed it, there can be no recovery, says Celsus; for this reason, that when a man entrusts his busi-

[1] *Nomina* here denotes the sums recoverable as *indebiti solutiones*: the evicted heir ought properly to sue for them, and restore the entire inheritance to the true heir. But to guard the former against possible loss, from the inability of the legatees to repay the legacies, he is allowed to cede his actions to the true heir, who then sues at his own risk. The same principle is applied to payments to creditors in D. 12. 6. 19. 1.

[2] The agent has no *actio mandati* against his principal, for the commission cannot be supposed to authorise the payment of an *indebitum*: still, having acted in ignorance and without fraud, he deserves protection, and so is allowed to bring an *utilis condictio indebiti* against the receiver of the money.

suarum constituit, id quoque mandare uidetur, ut soluat creditori, neque postea expectandum sit, ut ratum habeat. (1.) Idem Labeo ait, si procuratori indebitum solutum sit et dominus ratum non habeat, posse repeti. (2.) Celsus ait eum, qui procuratori debitum soluit, continuo liberari neque ratihabitionem considerari: quod si indebitum acceperit, ideo exigi ratihabitionem, quoniam nihil de hoc nomine exigendo mandasse uideretur, et ideo, si ratum non habeatur, a procuratore repetendum. (3.) Iulianus ait neque tutorem neque procuratorem soluentes repetere posse neque interesse, suam pecuniam an pupilli uel domini soluant.

7. Pomponius libro nono ad Sabinum. Quod indebitum per errorem soluitur, aut ipsum aut tantundem repetitur.

ness to an agent, he is understood to commission him to pay a creditor, and not to wait afterwards for ratification[1]. 1. Labeo also says that if payment of what is not due is made to an agent, and the principal gives no ratification, there can be a recovery[2]. 2. Celsus says that any one who has paid to an agent what is due (to his principal) is freed at once, and ratification is out of the question; but if the agent received what was not due, ratification is required, because the principal is not understood to have given any commission about the exaction of this amount; and so, if there be no ratification, it must be recovered from the agent. 3. Julian says that neither a guardian nor an agent can recover what he has paid, and that it is immaterial whether he pays his own money or that of his ward or principal[3].

7. *Pomponius.* When anything not due is paid by mistake, either the thing itself or its equivalent is recovered.

[1] Celsus holds that, because the agent can protect himself by the *actio mandati contraria*, he has therefore no need of the condiction: in fact the condiction is altogether out of place, as the payment is not *indebitum* but *debitum*. In § 53 below, however, we see that the agent might possibly have a choice between the two actions.

[2] There can be a *condictio indebiti* against the agent; but if ratification ensues, the *condictio* will, of course, be against the principal.

[3] The *condictio indebiti* is brought not by the payer, but the person on whose behalf the payment is made; at any rate if there is ratification. But if ratification is refused, the agent can recover; as we are expressly told in the opening paragraph of this excerpt. We can therefore only suppose this statement of Julian's to mean that an agent must sue in the principal's name, and not in his own, unless the principal refuses to ratify; and that a guardian must sue in the minor's name, as the minor cannot judge whether he ought to ratify or not.

8. Paulus libro sexto ad Sabinum. Quod nomine mariti, qui soluendo non sit, alius mulieri soluisset, repetere non potest: adeo debitum esset mulieri.

9. Ulpianus libro sexagensimo sexto ad edictum. Nam et maritus, si, cum facere nihil possit, dotem soluerit, in ea causa est ut repetere non possit.

10. Paulus libro septimo ad Sabinum. In diem debitor adeo debitor est, ut ante diem solutum repetere non possit.

11. Ulpianus libro trigensimo quinto ad Sabinum. Si is, cum quo de peculio actum est, per imprudentiam plus quam in peculio est soluerit, repetere non potest.

12. Paulus libro septimo ad Sabinum. Si fundi mei usum fructum tibi dedero falso existimans me eum tibi debere et antequam repetam decesserim, condictio eius ad heredem quoque meum transibit.

8. *Paulus.* When a stranger has made a payment to a woman on behalf of her insolvent husband, he cannot recover it; (because) it would certainly be due to the woman[1]:

9. *Ulpian*: for even the husband himself, if he has repaid a marriage-portion, being insolvent at the time, is, under the circumstances, unable to recover it[2].

10. *Paulus.* A person who has to pay money at a future date is (already) a debtor to this extent, that he cannot recover what has been paid before the time.

11. *Ulpian.* If a person who is sued for the amount of his slave's *peculium*, pays in error more than the value of the *peculium*, he cannot recover anything.

12. *Paulus.* If I give you the usufruct of my field, wrongly supposing that I owe it to you, and die before I have recovered it, a condiction on account thereof will devolve also to my heir.

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[1] Pothier would read *ideo* instead of *adeo*, and supply *quia;* but *adeo* in the sense of *utique*, *certe* is not uncommon in the Digest. See Dirksen *sub verb.*

The money is due morally, though the husband could avail himself of the *exceptio competentiae:* hence, any one who pays on the husband's behalf cannot have the *condictio indebiti*, to recover what has been paid in virtue of a natural obligation.

[2] He is under a moral obligation to repay the *dos* on the dissolution of the marriage, so if he pays in full, without availing himself of the *beneficium competentiae*, he has no *condictio indebiti.*

13. IDEM libro decimo ad Sabinum. Naturaliter etiam seruus obligatur: et ideo, si quis nomine eius soluat uel ipse manumissus, *vel*, ut Pomponius scribit, ex peculio, cuius liberam administrationem habeat, repeti non poterit: et ob id et fideiussor pro seruo acceptus tenetur et pignus pro eo datum tenebitur et, si seruus, qui peculii administrationem habet, rem pignori in id quod debeat dederit, utilis pigneraticia reddenda est. (1.) Item quod pupillus sine tutoris auctoritate mutuum accepit et locupletior factus est, si pubes factus soluat, non repetit.

14. POMPONIUS libro uicensimo primo ad Sabinum. Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem.

15. PAULUS libro decimo ad Sabinum. Indebiti soluti condictio naturalis est et ideo etiam quod rei solutae accessit, uenit in condictionem, ut puta partus qui ex ancilla natus sit uel quod alluuione accessit: immo et fructus, quos is cui solu-

13. *Paulus.* A slave too can be under a natural obligation; and so if any one makes a payment on his account, or if he himself pays after being manumitted, or[1] pays, as Pomponius mentions, out of the *peculium* with which he is allowed to deal as he pleases, there can be no recovery. Hence a surety received on the slave's behalf is bound, and a pledge given on his account can be held, and if the slave, who is allowed to deal with his *peculium*, has given a pledge to secure what he owes, an *actio utilis pigneraticia* must be granted. 1. So too, what a pupil has received on loan without his tutor's authorization, he cannot recover, if he has been enriched thereby, supposing he repays it after reaching puberty.

14. *Pomponius.* For it is naturally equitable that no one should become richer through the loss of another.

15. *Paulus.* The condiction for what has been paid without being due is founded on natural equity, and therefore even an accession to the article transferred is within the scope of the condiction; the offspring, for instance, born to a female slave, or an increase through alluvion: and further, the fruits which

[1] The word *vel* has no MS. authority, but it is clearly necessary, as all editors agree.

tum est bona fide percepit, in condictionem uenient. (1.) Sed et si nummi alieni dati sint, condictio competet, ut uel possessio eorum reddatur: quemadmodum si falso existimans possessionem me tibi debere alicuius rei tradidissem, condicerem. sed et si possessionem tuam fecissem ita, ut tibi per longi temporis praescriptionem auocari non possit, etiam sic recte tecum per indebiti condictionem agerem. (2.) Sed et si usus fructus in re soluta alienus sit, deducto usu fructu a te condicam.

16. Pomponius libro quinto decimo ad Sabinum. Sub condicione debitum per errorem solutum pendente quidem condicione repetitur, condicione autem exsistente repeti non potest. (1.) Quod autem sub incerta die debetur, die exsistente non repetitur.

17. Ulpianus libro secundo ad edictum. Nam si cum

the receiver has appropriated in good faith will also be within its scope. 1. And even if money belonging to another person has been given, the condiction can be brought, in order that the possession at any rate may be restored: just as I could use the condiction, if I had delivered to you the possession of anything, wrongly supposing that I owed you it. And further, if I had made the possession yours, so that through the operation of prescription it could not be reclaimed from you, even then I could properly proceed against you by *condictio indebiti*[1]. 2. So too, if the usufruct of the thing paid belongs to some other person, I can bring a condiction for the thing minus the usufruct.

16. *Pomponius.* When anything due upon condition is paid through error whilst the condition is still in suspense, it can be recovered, but (if it is paid) after the condition has vested, it cannot be recovered. 1. And what is due at an uncertain date cannot be recovered when the date has arrived[2].

17. *Ulpian.* For if I promise to give something when I

[1] In this case I bring a *condictio indebiti* for the property, not for the mere possession. For *indebitum* resembles *mutuum* in being created by consumption or usucapion, as well as by delivery. The possession only was *indebitum* at first, but upon completion of usucapion the property is *indebitum* also. So says Azo, basing his doctrine on *Inst.* 3. 14. 1: D. 23. 3. 67: D. 39. 6. 13. *pr.*

[2] Another reading is *non exsistente die repetitur*, "can be recovered before the day arrives."

moriar dare promisero et antea soluam, repetere me non posse Celsus ait: quae sententia uera est.

18. Idem libro quadragesimo septimo ad Sabinum. Quod si ea condicione debetur, quae omnimodo exstatura est, solutum repeti non potest, licet sub alia condicione, quae an impleatur incertum est, si ante soluatur, repeti possit.

19. Pomponius libro uicensimo secundo ad Sabinum. Si poenae causa eius cui debetur debitor liberatus est, naturalis obligatio manet et ideo solutum repeti non potest. (1.) Quamuis debitum sibi quis recipiat, tamen si is qui dat non debitum dat, repetitio competit, ueluti si is qui heredem se uel bonorum possessorem falso existimans creditori hereditario soluerit: hic enim neque uerus heres liberatus erit et is quod dedit repetere poterit: quamuis enim debitum sibi quis recipiat,

die, and pay previously, Celsus says I cannot recover; and this opinion is correct[1].

18. *Ulpian.* But if a thing is due under a condition which must inevitably come to pass, it cannot be recovered, if paid; whereas under the other kind of condition, where there is an uncertainty as to its ever existing, there can be recovery, if payment be made in advance.

19. *Pomponius.* If a debtor is released[2] in order to inflict a penalty on the creditor, the natural obligation continues, and so there is no recovery of what has been paid. 1. Although a man receive what is due to him, yet if the giver be paying what he does not owe, recovery is allowable; for instance, when one who erroneously supposes himself heir or *bonorum possessor* makes a payment to a creditor of the inheritance: for in this case the true heir is not acquitted, and the other can recover what he gave; for even though a man receives what is due to

[1] This seems opposed to § 16. 1, which implies that money due at an uncertain date can be recovered, if paid before the date; but the difference in the rule is caused by a difference in the hypothesis. In § 16. 1 Pomponius is speaking of a date purely uncertain, i.e. a day which may or may not arrive, and this obviously is the same as a mere condition: but in § 17 Ulpian is speaking of a date which must of necessity arrive, and such a day is the same as a condition which must come to pass, or which, in other words, is no condition at all. Hence § 17 is to be read in connection with § 18. See a very strong case in point in D. 19. 2. 19. 6.

[2] Sc. by operation of law.

tamen si is qui dat non debitum dat, repetitio competit. (2.) Si falso existimans debere nummos soluero, qui pro parte alieni, pro parte mei fuerunt, eius summae partem dimidiam, non corporum condicam. (3.) Si putem me Stichum aut Pamphilum debere, cum Stichum debeam, et Pamphilum soluam, repetam quasi indebitum solutum: nec enim pro eo quod debeo uideor id soluisse. (4.) Si duo rei, qui decem debebant, uiginti pariter soluerint, Celsus ait singulos quina repetituros, quia, cum decem deberent, uiginti soluissent, et quod amplius ambo soluerint, ambo repetere possunt.

20. Iulianus libro decimo digestorum. Si reus et fideiussor soluerint pariter, in hac causa non differunt a duobus reis promittendi: quare omnia, quae de his dicta sunt, et ad hos transferre licebit.

21. Paulus libro tertio quaestionum. Plane si duos reos non eiusdem pecuniae, sed alterius obligationis constitueris, ut

him, yet if he who gives it gives what he does not owe, recovery is allowable[1]. 2. If, supposing wrongly that I owe a debt, I pay money which is in part some other person's and in part my own, I can bring the condiction for half the amount, not for half the coins. 3. If when I owe Stichus I think that I owe Stichus or Pamphilus, and deliver Pamphilus, I can recover him as paid without being due: for I am not considered to have made this payment in lieu of what I owed. 4. If two debtors who owed ten *aurei*, have at one and the same time paid twenty[2], Celsus says that each can recover five, because when they owed ten they paid twenty, and so both can recover what both paid in excess.

20. *Julian.* If a principal debtor and his surety have paid at one and the same time, they do not in the case we are considering differ from two promisers: and so all that has been said about the latter we may apply to the former also.

21. *Paulus.* But undoubtedly, if you suppose two persons to be bound, not for the same sum of money, but in some alternative obligation, as for instance, for Stichus or Pamphilus,

[1] We must suppose that he gives *suo nomine*, imagining that he himself is the debtor; if he gives *alieno nomine*, he cannot recover, but has an *actio negotiorum gestorum* against the real debtor.

[2] If they had paid at different times, the one who paid last would have had the *condictio indebiti:* see D. 12. 6. 25.

puta Stichi aut Pamphili, et pariter duos datos, aut togam uel denaria mille, non idem dici poterit in repetitione ut partes repetant, quia nec soluere ab initio sic potuerunt. igitur hoc casu electio est creditoris, cui uelit soluere, ut alterius repetitio impediatur.

22. Pomponius libro uicensimo secundo ad Sabinum. Sed et si me putem tibi aut Titio promisisse, cum aut neutrum factum sit aut Titii persona in stipulatione comprehensa non sit, et Titio soluero, repetere a Titio potero. (1.) Cum iter excipere deberem, fundum liberum per errorem tradidi: incerti condicam, ut iter mihi concedatur.

23. Ulpianus libro quadragensimo tertio ad Sabinum. Eleganter Pomponius quaerit, si quis suspicetur transactionem factam uel ab eo cui heres est uel ab eo cui procurator est et quasi ex transactione dederit, quae facta non est, an locus sit repetitioni. et ait repeti posse: ex falsa enim causa datum

and both slaves to be given at one and the same time; or for a garment or a thousand pence, we cannot say the same, viz. that in the recovery they will recover proportionally, because they could not even have so paid originally. Hence, in such case, the creditor can elect to which of them he will make restitution so that the other's recovery may be prevented[1].

22. *Pomponius.* So also, supposing I think that I have made a promise to you or Titius, whereas neither promise was made, or Titius was not included in the stipulation, if I pay to Titius, I shall be able to recover from Titius. 1. When I had a right to retain a footpath, I delivered the land by mistake as free from servitude, I can bring a *condictio incerti*[2] to have the footpath granted to me.

23. *Ulpian.* Pomponius minutely discusses this case; if any one supposes that a compromise has been effected either by a person to whom he is heir or by one for whom he is agent, and makes payment on the hypothesis of the compromise, which in reality never took place, is recovery possible? And he says that it is, for the gift is on a false ground. The

[1] If a single debtor, bound to pay one thing or another, by mistake paid both, he could elect which should be restored to him. D. 12. 6. 26. 13: C. 4. 5. 10. Probably the creditor had the election when joint creditors had paid different things, because it was impossible that they would agree in their choice.

[2] Servitudes are *res incertae*, for corporeal things alone are considered certain.

est. idem puto dicendum et si transactio secuta non fuerit, propter quam datum est: sed et si resoluta sit transactio, idem erit dicendum. (1.) Si post rem iudicatam quis transegerit et solucrit, repetere poterit idcirco, quia placuit transactionem nullius esse momenti: hoc enim imperator Antoninus cum diuo patre suo rescripsit. retineri tamen atque compensari in causam iudicati, quod ob talem transactionem solutum est, potest. quid ergo si appellatum sit uel hoc ipsum incertum sit, an iudicatum sit uel an sententia ualeat? magis est, ut transactio uires habeat: tunc enim rescriptis locum esse credendum est, cum de sententia indubitata, quae nullo remedio adtemptari potest, transigitur. (2.) Item si ob transactionem alimentorum testamento relictorum datum sit, apparet posse repeti quod datum est, quia transactio senatusconsulto infirmatur. (3.) Si quis post transactionem nihilo minus condemnatus fuerit, dolo quidem id fit, sed tamen sententia ualet. potuit

same, I think, ought to be laid down, if the compromise on account of which the money was given did not take effect; and so too if the compromise was set aside, the same should also be ruled. 1. If any one enters into a compromise after judgment, and carries out his compromise, he can recover; because it is established that the compromise is unavailing: for the Emperor Antoninus and his late father issued rescripts to this effect. But a payment made in consequence of such a compromise can be retained and reckoned as a set-off against the amount of the judgment. What then, if an appeal has been made, or if the very point in dispute be whether there was a judgment, or whether the decision can be upheld? It is better to say that the compromise stands good: for we must consider the rescripts to apply when there is a compromise after an unassailable decision which cannot be attacked in any manner. 2. So too, if anything has been given in compromise for aliment bequeathed in a testament, it seems that what was given can be recovered, because the compromise is set aside by a *senatusconsultum*[1]. 3. If a defendant suffers judgment, in spite of a compromise having been effected, there is a want of good faith, but yet the decision stands good. But any one, who has made a com-

[1] The *senatusconsultum* is described at length in D. 2. 15. 8. It was proposed by the Emperor Marcus.

autem quis, si quidem ante litem contestatam transegerit, uolenti litem contestari opponere doli exceptionem: sed si post litem contestatam transactum est, nihilo minus poterit exceptione doli uti post secuti: dolo enim facit, qui contra transactionem expertus amplius petit. ideo condemnatus repetere potest quod ex causa transactionis dedit. sane quidem ob causam dedit neque repeti solet quod ob causam datum est causa secuta: sed hic non uidetur causa secuta, cum transactioni non stetur. cum igitur repetitio oritur, transactionis exceptio locum non habet: neque enim utrumque debet locum habere et repetitio et exceptio. (4.) Si qua lex ab initio dupli uel quadrupli statuit actionem, dicendum est solutum ex falsa eius causa repeti posse.

24. IDEM libro quadragensimo sexto ad Sabinum. Si is,

promise before *litis contestatio*, can put in the exception of fraud against his opponent who wishes to proceed to *litis contestatio:* and even if the compromise has taken place after *litis contestatio*, he can still employ the exception of subsequent fraud: for a man acts fraudulently who sues and proceeds with his claim after a compromise. Hence when he has suffered judgment he can recover what he gave on account of the compromise. And yet it is clear that he gave for a reason, and what has been given for a reason is not usually recoverable when the reason has come to pass; in this case, however, the reason does not seem to have come to pass, because there is no adherence to the compromise. And so, as a right of recovery springs up, the exception on the compromise is not applicable; for it is not right that both the recovery and the exception should be allowed. 4. If any law has established an action for two-fold or four-fold originally[1], we must admit that recovery is possible, when anything has been paid through a groundless belief that the law applies.

24. *Ulpian.* If any one who could protect himself by a

[1] *Ab initio=absque inficiatione.* If anything is paid by a defendant to procure a stay of proceedings in a case where denial augments the damages, "*quum per inficiationem lis crescit*," this is regarded as a *transactio*, and the money cannot be recovered, even though the suit could have been defended successfully. C. 4. 5. 4. But the case is different when the damages are double or quadruple, whether the claim is admitted or contested.

qui perpetua exceptione tueri se poterat, cum sciret sibi exceptionem profuturam, promiserit aliquid ut liberaretur, condicere non potest.

25. IDEM libro quadragensimo septimo ad Sabinum. Cum duo pro reo fideiussissent decem, deinde reus tria soluisset et postea fideiussores quina, placuit eum qui posterior soluit repetere tria posse: hoc merito, quia tribus a reo solutis septem sola debita supererant, quibus persolutis tria indebita soluta sunt.

26. IDEM libro uicensimo sexto ad edictum. Si non sortem quis, sed usuras indebitas soluit, repetere non poterit, si sortis debitae soluit: sed si supra legitimum modum soluit, diuus Seuerus rescripsit (quo iure utimur) repeti quidem non posse, sed sorti imputandum et, si postea sortem soluit, sortem quasi indebitam repeti posse. proinde et si ante sors fuerit soluta, usurae supra legitimum modum solutae quasi sors

perpetual exception, has promised something in return for an acquittance, although he knew that the exception would be in his favour, he cannot bring a condiction.

25. *Ulpian.* When two persons were sureties for a debtor to the amount of ten *aurei*, and the debtor thereupon paid three, and the sureties afterwards five each, it was decided that the surety who paid last could recover three: and properly, because when three had been paid by the debtor, only seven remained due; and after these had been discharged, three were paid without being due.

26. *Ulpian.* If a person has paid, not principal, but interest that is not due[1], he cannot recover, if the principal on which he paid it was due; but if he paid beyond the lawful rate, the late Emperor Severus decided by rescript, and we adopt the rule, that although the interest cannot be recovered, it must be reckoned towards the principal, and that if he afterwards pays the principal, the principal can be recovered as not due. In fact, even if the principal has been paid first, the interest in excess of the lawful rate[2] can be recovered as principal

[1] That is to say, due naturally only, and not legally.

[2] See C. 4. 32. 26. 1. *Illustres* and those of higher rank could not exact more than 4 per cent.: ordinary persons, not in business, could take 6, tradesmen and merchants 8. In the case of *pecunia trajectitia* 12 per cent. interest was lawful.

indebita repetuntur. quid si simul soluerit? poterit dici et tunc repetitionem locum habere. (1.) Supra duplum autem usurae et usurarum usurae nec in stipulatum deduci nec exigi possunt et solutae repetuntur, quemadmodum futurarum usurarum usurae. (2.) Si quis falso se sortem debere credens usuras soluerit, potest condicere nec uidetur sciens indebitum soluisse. (3.) Indebitum autem solutum accipimus non solum si omnino non debeatur, sed et si per aliquam exceptionem perpetuam peti non poterat: quare hoc quoque repeti poterit, nisi sciens se tutum exceptione soluit. (4.) Si centum debens, quasi ducenta deberem, fundum ducentorum solui, competere repetitionem Marcellus libro uicensimo digestorum scribit et centum manere stipulationem: licet enim placuit rem pro pecunia solutam parere liberationem, tamen si ex falsa debiti quantitate maioris pretii res soluta est, non fit confusio partis rei cum pecunia (nemo enim inuitus compellitur ad commu-

not due. But what if he paid them together? It may be said that in that case too recovery is allowable. 1. Interest, however, and interest upon interest, if amounting to more than double (the principal) can neither be made a matter of stipulation nor be exacted[1]; and, if paid, can be recovered, in like manner as interest on future interest can. 2. If any one, erroneously supposing that he owes a principal sum, has paid interest, he can bring a condiction, and is not considered to have paid with knowledge a sum not due. 3. And we understand a payment to be made without being due not only when it is not owed at all, but also when it could not be sued for by reason of some perpetual exception: hence, this too can be recovered, unless a man paid it with knowledge that he was protected by the exception. 4. If I owed one hundred *aurei* and delivered a field worth two hundred, under the impression that I owed two hundred, Marcellus in the 20th book of his *Digests* writes that recovery[2] is allowable, and that the stipulation for one hundred remains binding: for although it has been laid down that a thing paid in lieu of money works an acquittance[3], still if a thing of too great value is paid through error as to the amount of the debt, there is no setting-off of part of the thing against the money[4], (for no one is compelled

[1] See C. 4. 32. 27. 1.
[2] "*Repetitionem*," scilicet fundi." Accursius.
[3] D. 13. 5. 1. 5.
[4] D. 50. 17. 84. *pr.*

nionem), sed et condictio integrae rei manet et obligatio incorrupta: ager autem retinebitur, donec debita pecunia soluatur. (5.) Idem Marcellus ait, si pecuniam debens oleum dederit pluris pretii quasi plus debens, uel cum oleum deberet, oleum dederit quasi maiorem modum debens, superfluum olei esse repetendum, non totum, et ob hoc peremptam esse obligationem. (6.) Idem Marcellus adicit, si, cum fundi pars mihi deberetur, quasi totus deberetur aestimatione facta, solutio pecuniae solidi pretii fundi facta sit, repeti posse non totum pretium, sed partis indebitae pretium. (7.) Adeo autem perpetua exceptio parit condictionem, ut Iulianus libro decimo scripsit, si emptor fundi damnauerit heredem suum, ut uenditorem nexu uenditi liberaret, mox uenditor ignorans rem tradiderit, posse eum fundum condicere: idemque et si debitorem suum damnauerit liberare et ille ignorans soluerit. (8.) Qui filio familias soluerit, cum esset eius peculiaris debitor, si quidem ignorauit ademptum ei peculium, liberatur: si scit et

to hold property in common against his will), but there remains a condiction for the whole thing, and the obligation continues intact: but the land will be retained, until the money owing is paid. 5. Marcellus also says, if a person who owed money has given oil of higher value, under the impression that he owed more (than he did), or if one who owed oil, has given oil under the impression that he owed a larger quantity, the excess of the oil is to be recovered, not the whole of it, and the obligation therefore is swept away. 6. Marcellus further adds, that if a part of a field was owing to me, and after a valuation has been made, under the impression that the whole was due, a payment of money has been made of the value of the whole field, the whole price cannot be recovered, but the price of the part not due. 7. But a perpetual exception so universally gives ground for a condiction, that Julian has stated in his tenth book that if the purchaser of a field has charged his heir to release the vendor from his obligation on the sale, and the vendor, not knowing this, has afterwards delivered the field, he can bring a condiction for it: and so too, if he has charged him to acquit a debtor of his, and the latter, not knowing the fact, has paid. 8. A person who has made payment to a *filiusfamilias*, being his debtor in connection with his *peculium*, is discharged, if he did not know that his *peculium* had been taken from him: but if he knows this and yet

soluit, condictionem non habet, quia sciens indebitum soluit. (9.) Filius familias contra Macedonianum mutuatus si soluerit et patri suo heres effectus uelit uindicare nummos, exceptione summouebitur a uindicatione nummorum. (10.) Si quis quasi ex compromisso condemnatus falso soluerit, repetere potest. (11.) Hereditatis uel bonorum possessori, si quidem defendat hereditatem, indebitum solutum condici poterit: si uero is non defendat, etiam debitum solutum repeti potest. (12.) Libertus cum se putaret operas patrono debere, soluit: condicere eum non posse, quamuis putans se obligatum soluit, Iulianus libro decimo digestorum scripsit: natura enim operas patrono libertus debet. sed et si non operae patrono sunt solutae, sed, cum officium ab eo desideraretur, cum patrono

pays, he has not the condiction, because he has knowingly paid what is not due. 9. When a *filiusfamilias* has borrowed money in contravention of the *senatusconsultum Macedonianum*, if he has repaid it, and afterwards, becoming heir to his father, wishes to claim the money, he will be defeated in his claim by the exception[1]. 10. If any one wrongly condemned in damages, pays under the idea that he is compromising, he can recover his money. 11. A condiction for what has been paid without being due can be brought against an heir or a *bonorum possessor*, if he defends his right to the inheritance: but if he does not defend it, there can also be recovery of what was paid being due[2]. 12. A freedman, imagining that he owed services to his patron[3], discharged them: Julian in the tenth book of his Digests stated that he could not recover, even though he paid under the impression that he was under obligation: for the freedman is bound naturally to do services for his patron. And even if the services were not done for the patron, but the freedman, when his personal duty

[1] The S. C. Macedonianum took away the right of action from a person who had lent money to a *filiusfamilias*, so that he could neither sue the father, whilst *potestas* continued, nor the son after it had ended. But if the son paid it after he had become a *paterfamilias*, the money could not be recovered; because it was paid on account of a natural obligation; and because the rule against its payment was rather for the punishment of the lender than for the protection of the borrower.

[2] The rule is the same when payment is made to a person supposed to be an agent, but not really an agent. C. 4. 5. 8.

[3] Sc. under the impression that he had made some special promise to render them. He owed them naturally, even without a promise.

decidit pecunia et soluit, repetere non potest. sed si operas patrono exhibuit non officiales, sed fabriles, ueluti pictorias uel alias, dum putat se debere, uidendum an possit condicere. et Celsus libro sexto digestorum putat eam esse causam operarum, ut non sint eaedem neque eiusdem hominis neque eidem exhibentur: nam plerumque robur hominis, aetas temporis opportunitasque naturalis mutat causam operarum, et ideo nec uolens quis reddere potest. sed hae, inquit, operae recipiunt aestimationem: et interdum licet aliud praestemus, inquit, aliud condicimus: ut puta fundum indebitum dedi et fructus condico: uel hominem indebitum, et hunc sine fraude

was required from him, compounded with his patron for a sum of money, and paid it, this too he cannot recover. But if he has performed services for his patron which were not matters of personal duty, but matters of handicraft, as painting and the like, thinking that he owes them, let us consider whether he can bring a condiction[1]. And Celsus in the sixth book of his *Digests* expresses an opinion that the nature of services is such that they are not always the same[2], nor due from all men alike, nor to all patrons alike: for in general the strength of a man, his age and his natural ability cause variation in the character of his services, and so a man may not be able to render them, even though willing. But these services, he says, admit of valuation; and sometimes, although we give one thing, we bring the condiction for another; for instance, I have given a field that I did not owe, and bring a condiction for the fruits: or (I have given) a slave who was not due, and you have sold him without fraud for a trifling price, then you are only bound to refund what you have out of his price; or I

[1] The *operae* of a freedman were either *officiales* or *fabriles*. *Officiales* were those which have relation to the person of the patron, as to attend him at his house, accompany him to the *forum*, &c.: *fabriles* were those which consist in the performance of actual work, and can be measured in money value. A freedman is bound to render *operae officiales*, whether he promised to do so or not: *operae fabriles*, on the contrary, are only due by reason of express promise. *Operae officiales* being due to the person of the patron, cannot be claimed by the patron's heirs, but *operae fabriles* can be assigned by the patron in his life-time and are due to his heirs after his death. See D. 38. 1.

[2] There is no contradiction between this passage and D. 45. 2. 5, for although it is stated in the latter excerpt that the work of a deputy is equivalent to the work of the person whose place he supplies, yet it is added that the substitute must be *ejusdem peritiae*.

modico distraxisti, nempe hoc solum refundere debes quod ex pretio habes: uel meis sumptibus pretiosiorem hominem feci, nonne aestimari haec debent? sic et in proposito, ait, posse condici, quanti operas essem conducturus. sed si delegatus sit a patrono officiales operas, apud Marcellum libro uicensimo digestorum quaeritur. et dicit Marcellus non teneri eum, nisi forte in artificio sint (hae enim iubente patrono et alii edendae sunt): sed si soluerit officiales delegatus, non potest condicere neque ei cui soluit creditori, cui alterius contemplatione solutum est quique suum recipit, neque patrono, quia natura ei debentur. (13.) Si decem aut Stichum stipulatus soluam quinque, quaeritur, an possim condicere: quaestio ex hoc descendit, an liberer in quinque: nam si liberor, cessat condictio, si non liberor, erit condictio. placuit autem, ut Celsus

have made your slave more valuable by what I have spent upon him; ought not these points to be taken into account? And so too in the case before us, he says, there can be a condiction for the sum I should pay to hire his services. But the question is discussed by Marcellus in the twentieth book of his *Digests*, supposing he is assigned by his patron to render (to another) his official services[1]? And Marcellus says he is not bound to render them, unless they are matters of handicraft[2], for these must be rendered to another also, if the patron requests it; but if the assigned freedman has performed official services, he can neither bring a condiction against the person for whose benefit, as creditor (of his patron), he has performed them, since they were performed for him out of regard for the other[3], and he only receives what is his own; nor against the patron, because they are naturally due to him. 13. If I have made a stipulatory promise of ten *aurei* or Stichus, and pay five *aurei*: it is asked whether I can bring a condiction. The question turns on this, whether I am acquitted as to five; for if I am acquitted, the condiction is unavailing; if I am not acquitted, there will be a condiction. But it has been settled, as Celsus has stated in the sixth book of his *Digests* and

[1] Beek reads "*in* officiales operas." In the Berlin edition (Weidmann's) it is suggested that some words have slipped out of the sentence, and that we should read "si delegatus sit a patrono officiales operas *praestaturus, num debeat operas?*"

[2] Sc. unless they are *fabriles*, and therefore not *officiales* at all.

[3] Sc. the patron.

libro sexto et Marcellus libro uicensimo digestorum scripsit, non perimi partem dimidiam obligationis, ideoque eum qui quinque soluit in pendenti habendum, an liberaretur, petique ab eo posse reliqua quinque aut Stichum et, si praestiterit residua quinque, uideri eum et priora debita soluisse, si autem Stichum praestitisset, quinque eum posse condicere quasi indebita. sic posterior solutio comprobabit, priora quinque utrum debita an indebita soluerentur. sed et si post soluta quinque et Stichus soluatur et malim ego habere quinque et Stichum reddere, an sim audiendus, quaerit Celsus. et putat natam esse quinque condictionem, quamuis utroque simul soluto mihi retinendi quod uellem arbitrium daretur. (14.) Idem ait et si duo heredes sint stipulatoris, non sic posse alteri quinque solutis alteri partem Stichi solui: idem et si duo sint promissoris heredes. secundum quae liberatio non contingit, nisi aut utrique quina aut utrique partes Stichi fuerunt solutae.

Marcellus in the twentieth of his, that the half of an obligation cannot be destroyed; and therefore whether he who has paid five *aurei* is acquitted must be considered to be in suspense; and the other five or Stichus may be demanded from him; and if he pays the other five, he is considered to have paid the former five also as due; but if he pays Stichus, he can bring a condiction for the five as never due. Thus the second payment will decide whether the first five were paid as due or as not due. But if, after the five have been paid, Stichus also is paid, and I prefer to keep the five and to return Stichus, am I to be listened to, asks Celsus. And he thinks that a condiction arises for the five; although if both were paid together, a choice would be given me to retain which I pleased[1]. 14. He also says, if there be two heirs to the stipulator, and five *aurei* be paid to one, half of Stichus cannot be paid to the other: and so too if there are two heirs of the promiser. Hence there is no acquittance, unless five are paid to each or half of Stichus to each.

[1] See Celsus in D. 31. 1. 19. Because, as Voet says, in his commentary on this passage, the receiver of the slave and money changes his character, and from being a creditor on a contract, bound to sue for the alternative, he becomes a debtor on a quasi-contract, liable to be sued for the alternative. Papinian and Salvius Julianus held that the donor could elect which should be returned, because he had originally a right to elect which he would pay, and Justinian decided the dispute in favour of Papinian and Julian. C. 4. 5. 10.

27. Paulus libro uicensimo octauo ad edictum. Qui loco certo debere existimans indebitum soluit, quolibet loco repetet: non enim existimationem soluentis eadem species repetitionis sequitur.

28. Idem libro trigensimo secundo ad edictum. Iudex si male absoluit et absolutus sua sponte soluerit, repetere non potest.

29. Ulpianus libro secundo disputationum. Interdum persona locum facit repetitioni, ut puta si pupillus sine tutoris auctoritate uel furiosus uel is cui bonis interdictum est soluerit: nam in his personis generaliter repetitioni locum esse non ambigitur. et si quidem extant nummi, uindicabuntur, consumptis uero condictio locum habebit.

30. Idem libro decimo disputationum. Qui inuicem creditor idemque debitor est, in his casibus, in quibus compen-

27. *Paulus.* A person who has paid what is not due, under the impression that it was due in a particular place, can recover it in any place: for this kind of recovery does not depend upon the idea entertained by the payer[1].

28. *Paulus.* If a *judex* has improperly acquitted a man, and the man pays voluntarily after being acquitted, he cannot recover[2].

29. *Ulpian.* Sometimes *status* gives occasion for recovery; as, for instance, if a ward without authorization of his tutor, or a madman, or a person interdicted from the management of his own property has made a payment: for there is no doubt that, as a rule, there is a recovery for such persons; and if the money is existent, the mode is by vindication; if it be consumed, a condiction will be appropriate.

30. *Ulpian.* He who is both debtor and creditor, if he has paid under circumstances where set-off is not allowable,

[1] It might have been expected that he would have recovery at the place where he paid the money: but he paid it there under a wrong impression, for it was never due at all; therefore his opinion is of no consequence.

[2] He could avail himself of the exception *rei judicatae*, if sued; for legally the obligation is dissolved: but, as it still subsists naturally, he cannot recover if he has paid freely. See D. 50. 17. 66. *Sponte sua* means with knowledge that he was able to use the exception. See § 26. 3 above.

satio locum non habet, si soluit, non habet condictionem ueluti indebiti soluti, sed sui crediti petitionem.

31. IDEM libro primo opinionum. Is, qui plus quam hereditaria portio efficit per errorem creditori cauerit, indebiti promissi habet condictionem.

32. IULIANUS libro decimo digestorum. Cum is qui Pamphilum aut Stichum debet simul utrumque soluerit, si, posteaquam utrumque soluerit, aut uterque aut alter ex his desiit in rerum natura esse, nihil repetet: id enim remanebit in soluto quod superest. (1.) Fideiussor cum paciscitur, ne ab eo pecunia petatur, et per imprudentiam soluerit, condicere stipulatori poterit et ideo reus quidem manet obligatus, ipse autem sua exceptione tutus est. nihil autem interest, fideiussor an heres eius soluat: quod si huic fideiussori reus heres extiterit et soluerit, nec repetet et liberabitur. (2.) Mulier si in

has no condiction on the ground of having paid what was not due, but has a right to recover the debt due to himself.

31. *Ulpian.* An heir who has in mistake given security to a creditor beyond the amount of his interest in the inheritance, has a condiction for the cancelling of a promise not due[1].

32. *Julian.* When a man who owes Stichus or Pamphilus pays both of them together, if, after he has paid both, both or one of them cease to exist, he will recover nothing: for that which survives will remain as the payment[2]. 1. When a surety makes a pact that the money is not to be demanded from him, and through forgetfulness pays it, he can bring a condiction against the stipulator, and so the principal debtor remains bound, but he (the surety) is protected by his exception[3]. And it makes no matter whether the surety pays or whether his heir does so; but if the principal debtor becomes heir to the surety and pays the money, he will not recover, but will be discharged. 2. If a woman[4] is under the impression

[1] From C. 4. 9. 2 it is clear that the appropriate condiction in this case is *condictio sine causa:* but the excerpt is inserted in this title, because the giving of needless security is closely analogous to the payment of an *indebitum.*

[2] Because, if payment had not yet taken place, the loss would fall on the debtor, who must in such event give the other slave. D. 18. 1. 34. 6.

[3] He is protected by his exception in two senses: 1st directly, inasmuch as he could use it to resist the creditor's claim, 2nd indirectly, as it will furnish ground for a *condictio indebiti*, if he has paid in error.

[4] Gothofred would read *mater*,

ea opinione sit, ut credat se pro dote obligatam, quidquid dotis nomine dederit, non repetit: sublata enim falsa opinione relinquitur pietatis causa, ex qua solutum repeti non potest. (3.) Qui hominem generaliter promisit, similis est ei qui hominem aut decem debet: et ideo si, cum existimaret se Stichum promisisse, cum dederit, condicet, alium autem quemlibet dando liberari poterit.

33. IDEM libro trigesimo nono digestorum. Si in area tua aedificassem et tu aedes possideres, condictio locum non habebit, quia nullum negotium inter nos contraheretur: nam is qui non debitam pecuniam soluerit, hoc ipso aliquid negotii gerit: cum autem aedificium in area sua ab alio positum

that she is bound for a marriage-portion, she does not recover what she has given by way of portion: for when the false impression is removed, there remains the reason of affection, on account whereof what has been paid cannot be recovered. 3. He who has promised a slave in general terms, is like a person who owes a slave or ten *aurei:* and therefore, if he has given Stichus, under the impression that he promised to give him, he will have a condiction, and by giving any other slave can release himself[1].

33. *Julian.* If I have built on your ground, and you have possession of the building, the condiction has no application, because there has been nothing in the nature of a contract between us; for he who has paid money that is not due, by this very circumstance engages in something akin to a contract: but where an owner occupies a building erected on his land by another person, he enters into nothing in the nature of a con-

but for this there is no MSS. authority, though it is clear enough that the woman meant is the mother of the bride.

[1] See note on 12. 6. 26. 13 above. The man who promises *a* slave, without further specification, can give any slave he pleases; and hence resembles, in the matter of having an option, a person who has promised 10 *aurei* or Stichus, or 10 *aurei* or an unspecified slave. But from D. 31. 1. 19 we should conclude that when payment has been made, the option is gone and recovery impossible. Pothier thinks that the passage from D. 31. 1 and the present passage are absolutely at variance, and exhibit the conflicting views of the two schools of law. Gothofred says that D. 12. 6. 32. 3 refers to an error of fact, the promiser thinking he had engaged to give Stichus, when in reality he had promised a slave simply, without specifying any individual; and that D. 31. 1. 19 relates to the case when he delivers Stichus, who is a more valuable slave than Pamphilus, in error of law, supposing that he is bound to give the better one.

dominus occupat, nullum negotium contrahit. sed et si is qui in aliena area aedificasset, ipse possessionem tradidisset, condictionem non habebit, quia nihil accipientis faceret, sed suam rem dominus habere incipiat. et ideo constat, si quis, cum existimaret se heredem esse, insulam hereditariam fulsisset, nullo alio modo quam per retentionem impensas seruare posse.

34. IDEM libro quadragensimo digestorum. Is cui hereditas tota per fideicommissum relicta est et praeterea fundus, si decem dedisset heredi, et heres suspectam hereditatem dixerit et eam ex Trebelliano restituerit, causam dandae pecuniae

tract. And even if the man who built on another's ground, has himself transferred the possession, he will not have a condiction: because he has not made anything to be the property of the receiver, but the owner begins to have his own property. And so it is admitted that if any one has strengthened a block of buildings forming part of an inheritance, under the belief that he is the heir, he can recover his expenses by no other mode except retention[1].

34. *Julian.* The whole of an inheritance having been left in trust for a certain person, and a field as well, on condition of his giving ten *aurei* to the heir, the heir declared the inheritance to be a doubtful one and handed it over (to the beneficiary under the trust) under the *senatusconsultum Trebellianum:* he has no reason for giving the money[2], and can

[1] This statement seems at first sight to be at variance with § 40. 1 below and with D. 30. 1. 60; but both the last-named passages refer to an heir, who is in lawful possession of a legacy or trust, even as against the person to whom it is bequeathed, till it becomes his duty to transfer it to the legatee or beneficiary under the trust. Here, however, the possession is not lawful against the true owner. Hence, although an *exceptio* is granted to the possessor, it is not sufficiently founded on equity: and therefore cannot be replaced by a *condictio*. This seems to be the best explanation. Cujas, however, thinks that Julian is here speaking only of the rule of strict law, and that he does not deny that on equitable grounds there is a *utilis condictio incerti:* but Julian's words seem very explicit: "nullo alio modo quam per retentionem impensas servare posse."

[2] Because the field, on account of which he was to give the money, is included in the inheritance which the heir voluntarily makes over to him. The heir who makes entry against his will can claim secondary *fideicommissa* which are charged in his favour upon primary *fideicommissarii*, provided they are not given to him as heir, but as a specific individual: but here clearly the ten *aurei* are to be his as heir, if he is to get them at all.

non habet, et ideo quod eo nomine quasi implendae condicionis gratia dederit, condictione repetet.

35. Idem libro quadragensimo quinto digestorum. Qui ob rem non defensam soluit, quamuis postea defendere paratus est, non repetet quod solucrit.

36. Paulus libro quinto epitomarum Alfeni digestorum. Seruus cuiusdam insciente domino magidem commodauit: is cui commodauerat pignori eam posuit et fugit: qui accepit non aliter se redditurum aiebat, quam si pecuniam accepisset: accepit a seruulo et reddidit magidem: quaesitum est, an pecunia ab eo repeti possit. respondit, si is qui pignori accepisset magidem alienam scit apud se pignori deponi, furti eum se obligasse ideoque, si pecuniam a seruulo accepisset redimendi furti causa, posse repeti: sed si nescisset alienam apud se deponi, non esse furem, item, si pecunia eius nomine, a quo pignus acceperat, a seruo ei soluta esset, non posse ab eo repeti.

recover by condiction whatever he gave in respect of the field, under the impression that a condition had to be fulfilled by him.

35. *Julian.* He who has made payment because of a suit being undefended, cannot recover what he has paid, even though he is afterwards prepared to defend the suit[1].

36. *Paulus.* A certain man's slave without his master's knowledge lent a dish: the person to whom he had lent it pledged it and absconded: the holder (of the pledge) declared that he would not return it, unless he received his money: he received it from the slave and returned the dish: it was asked whether the money could be recovered from him. The answer was, if the receiver in pledge knew that the dish deposited with him in pledge was another man's, he has made himself liable for theft, and therefore, if he received money from the slave to restore a stolen article, that money can be recovered: but if he did not know that the article deposited with him belonged to another, he is no thief. And so, if the money was paid to him by the slave on account of the person from whom he had received the pledge, it cannot be recovered from him.

[1] The defendant who has entered into a stipulation *judicatum solvi*, and to such an one this excerpt refers, has bound himself in a threefold obligation: "de re judicata, de re defendenda, de dolo malo." D. 46. 7. 6. Just. *Inst.* 4. 11. 4.

37. Iulianus libro tertio ad Urseium Ferocem. Seruum meum insciens a te emi pecuniamque tibi solui: eam me a te repetiturum et eo nomine condictionem mihi esse omnimodo puto, siue scisses meum esse siue ignorasses.

38. Africanus libro nono quaestionum. Frater a fratre, cum in eiusdem potestate essent, pecuniam mutuatus post mortem patris ei soluit: quaesitum est, an repetere possit. respondit utique quidem pro ea parte, qua ipse patri heres exstitisset, repetiturum, pro ea uero, qua frater heres exstiterit, ita repetiturum, si non minus ex peculio suo ad fratrem peruenisset: naturalem enim obligationem quae fuisset hoc ipso sublatam uideri,

37. *Julian.* I bought my own slave from you, not knowing he was mine, and paid you the money. I think that in any case I can recover the money from you and have a condiction on account of it, whether you knew that the slave was mine or did not know[1].

38. *Africanus.* One brother borrowed money from another at a time when they were both in the same man's *potestas*, and paid it to him after the death of the father: it was asked whether he could recover it. The answer was that he could certainly recover it to the proportion in which he was heir to his father; but as to the proportion in which his brother was heir, this he could (only) recover, if his brother had received a sum not smaller out of his (the payer's) *peculium*[2]. For the natural obligation, which had once existed, seemed to

[1] The transaction is in any case void, for a man cannot buy his own property. If you did not know that the slave was mine, I must employ the *condictio indebiti;* but if you did know, there will be a *condictio furtiva*. D. 13. 1. 18: D. 47. 2. 44. *pr.*

[2] The *peculium* of a son forms part of the father's inheritance: and therefore has to be shared with the co-heirs, unless specially devised as a legacy to the son. In the case suggested in the text, the two sons ought to have put back their two *peculia* into the inheritance, and then divided equally the amount of the inheritance, including these *peculia*. It is clear that the result would then have been the same, whether the debt of the one brother to the other was paid or was not paid before the *collatio bonorum*. But it is supposed that the debt is paid by the one to the other after a division of the inheritance; and clearly the result is that the shares of the brothers in the inheritance are made unequal, differing obviously by twice the amount of the debt paid. Ought there then to be a recovery? The debt due from the first brother to the second was really a debt due to the father, hence devolves on the two as co-heirs: there is therefore a *condictio indebiti* as to half, which was due from the first brother to himself, and which he has instead paid to the second brother. But, Julian adds, there is also a

quod peculii partem frater sit consecutus, adeo ut, si praelegatum filio eidemque debitori id fuisset, deductio huius debiti a fratre ex eo fieret. idque maxime consequens esse ei sententiae, quam Iulianus probaret, si extraneo quid debuisset et ab eo post mortem patris exactum esset, tantum iudicio eum familiae herciscundae reciperaturum a coheredibus fuisse, quantum ab his creditor actione de peculio consequi potuisset. igitur et si re integra familiae herciscundae agatur, ita peculium diuidi aequum esse, ut ad quantitatem eius indemnis a coherede praestetur: porro eum, quem aduersus extraneum defendi

be removed by the mere fact that the one brother obtained a portion of the *peculium* of the other: so that even if the *peculium* of the brother who was the debtor had been given to him as a legacy, the debt might have been deducted from it by the other brother. And this rule is the obvious consequence of an opinion which Julian approved: viz. that if one brother had owed anything to a stranger, and it had been exacted from him after his father's death, he would have recovered from his co-heirs, by *judicium familiae erciscundae*, the amount which the creditor could have got from them by *actio de peculio*. Hence too, if there be a *judicium familiae erciscundae* before anything is done[1], it is proper for the *peculium* to be so divided that the debtor be guaranteed by his co-heir to the amount of it[2]: therefore, he who ought to be protected against a stranger,

condictio indebiti as to the other half as well: for the first brother, if he had paid his debt before *collatio*, would have contributed to the *hereditas* his *peculium*, minus the amount of the debt, and would still have received one-half of the *hereditas* on the final division: hence, the second brother has already been paid by the needless excess of the *peculium* contributed by the first. But if the first had no *peculium*, or was a bankrupt as to his *peculium*, then the second brother retains the second half, or at any rate so much of it as measures the amount by which his share of the inheritance would have been augmented, if the first brother had borrowed money to make repayment to the other, prior to the *collatio bonorum* and the division of the inheritance. This is only fair; for in such a case the second brother has not been paid by the first either legally or naturally; and it is only because he has been paid naturally, when the first has had a *peculium* to collate, that the contrary rule is in general upheld.

[1] *Re integra* here means "before the creditor has taken proceedings against the heir who is in debt to him." In the case just discussed the partition of the inheritance had been made without thought of the debt due from one of the heirs to a stranger: here we are considering what ought to be done, if the debt is thought of at the time of partition.

[2] *Ejus* must mean the portion of the debt recoverable from the co-

oportet, longe magis in eo, quod fratri debuisset, indemnem esse praestandum. (1.) Quaesitum est, si pater filio crediderit isque emancipatus soluat, an repetere possit. respondit, si nihil ex peculio apud patrem remanserit, non repetiturum: nam manere naturalem obligationem argumento esse, quod extraneo agente intra annum de peculio deduceret pater, quod sibi filius debuisset. (2.) Contra si pater quod filio debuisset eidem emancipato soluerit, non repetet: nam hic quoque manere naturalem obligationem eodem argumento probatur, quod, si extraneus intra annum de peculio agat, etiam quod pater ei debuisset computetur. eademque erunt et si extraneus heres exheredato filio soluerit id, quod ei pater debuisset. (3.) Legati satis accepi et cum fideiussor mihi soluisset, apparuit indebitum fuisse legatum: posse eum repetere existimauit.

must still more be saved from harm in reference to what he owed to a brother. 1. It was asked, supposing a father has lent money to his son, and the son repays it after emancipation, can he recover it? The answer was, if no part of the *peculium* was left in the father's hands, he cannot recover[1]: for that the natural obligation continues is proved by the fact that if a stranger sued *de peculio* within the year[2], the father could set off what the son owed to him. 2. In the converse case, if a father has paid to his son after emancipation a debt which he owed him (before emancipation), he cannot recover. For that the natural obligation continues in this case also is proved in the same way, because if a stranger sues within the year *de peculio*, account is also taken[3] of what the father owed to the son. And such also will be the rules if an *extraneus heres* pays to a disinherited son what his father owed him. 3. I took sureties for a legacy, and after one of them had paid me, it was proved that the legacy was not due; it was held that he could recover[4].

heir by *actio de peculio* brought by the creditor.

[1] If the father had retained the *peculium*, the amount retained would be the measure of what the son could reclaim as *indebitum*.

[2] The action can be brought whilst the son is still under *potestas* and for one year afterwards. D. 15. 2. 1. *pr.*

[3] Sc. account is taken of this as well as of what is actually in the father's hands.

[4] He must have paid *suo nomine*. See § 47 below. If he paid *alieno nomine* he has an action of mandate

39. Marcianus libro octauo institutionum. Si quis, cum a fideicommissario sibi cauere poterat, non cauerit, quasi indebitum plus debito eum solutum repetere posse diui Seuerus et Antoninus rescripserunt.

40. Idem libro tertio regularum. Qui exceptionem perpetuam habet, solutum per errorem repetere potest: sed hoc non est perpetuum. nam si quidem eius causa exceptio datur cum quo agitur, solutum repetere potest, ut accidit in senatus consulto de intercessionibus: ubi uero in odium eius cui debe-

39. *Marcian.* If any one who was able to demand security from a *fideicommissarius*, has not taken security, the late Emperors Severus and Antoninus declared in a rescript that he can recover, as not due, what he has paid in excess of his obligation[1].

40. *Marcian.* He who has a perpetual exception can recover what he has paid in error: but this rule does not apply to all cases. For it is when an exception is granted for the sake of the defendant, that he can recover what he has paid, as is the case under the *senatusconsultum de intercessionibus*[2]: but when the exception is granted to prejudice the creditor, what

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against his principal, and the principal has the *condictio indebiti* against the receiver of the money.

[1] There are three cases in which the *fiduciarius* can demand security from the *fideicommissarius*.

1. When a gift is upon condition that something be not done, e.g. "si in Capitolium non ascenderit, si Stichum non manumiserit:" the *fiduciarius* can, when he pays the money, require a *cautio Muciana* from the *fideicommissarius*. D. 35. 1. 7. *pr.*
2. When the heir pays over a portion of an inheritance to the *fideicommissarius*, he has a right to a stipulation *partis et pro parte* to protect him against loss in suits commenced or engagements made by him prior to the transfer. D. 36, 1. 36: *Gai. Comm.* 2. 254.
3. When a patron pays a trust-bequest to a stranger, he has a right to a *cautio* to save him from being so overcharged by payment of debts subsequently proved, as to be left in possession of less than his proper share. D. 36. 1. 60: *Gai. Comm.* 3. 41, 42.

In all these cases the mere omission to take the *cautio* gives the *fiduciarius* a right to recover what he has paid: or in cases (1) and (2) to bring a *condictio incerti* to enforce the giving of a *cautio*. D. 7. 5. 5. 1: D. 35. 4. 3. 10.

[2] Sc. the S. C. Velleianum, which forbade women to "intercede." *Intercessio* is any contract which one person enters into as substitute for another; or as Westenberg puts it: "est autem *intercedere* nihil aliud

tur exceptio datur, perperam solutum non repetitur, ueluti si filius familias contra Macedonianum mutuam pecuniam acceperit et pater familias factus soluerit, non repetit. (1.) Si pars domus, quae in diem per fideicommissum relicta est, arserit ante diem fideicommissi cedentem et eam heres sua impensa refecerit, deducendam esse impensam ex fideicommisso constat et, si sine deductione domum tradiderit, posse incerti condici, quasi plus debito dederit. (2.) Si pactus fuerit patronus cum liberto, ne operae ab eo petantur, quidquid postea solutum fuerit a liberto, repeti potest.

41. Neratius libro sexto membranarum. Quod pupillus si sine tutoris auctoritate stipulanti promiserit soluerit, repetitio est, quia nec natura debet.

42. Ulpianus libro sexagensimo octauo ad edictum. Poenae non solent repeti, cum depensae sunt.

has been wrongly paid cannot be recovered; for instance, when a *filiusfamilias* has received money on loan in contravention of the *senatusconsultum Macedonianum*, and repaid it after becoming a *paterfamilias*, he does not recover it. 1. If part of a house, which has been left in trust for transfer on a certain day, has been burnt before the vesting of the date of the trust, and the heir has repaired it at his own expense, it is admitted that the expense ought to be deducted from the trust property, and if he has delivered the house without making the deduction, he can bring a *condictio incerti* on the ground that he has given more than was due. 2. If a patron has made a pact with his freedman, that services shall not be required from him, anything subsequently paid by the freedman can be recovered[1].

41. *Neratius.* Whatever a pupil has promised to a stipulator without authorization of his tutor, and has paid[2], can be recovered, because it is not due even naturally.

42. *Ulpian.* Penal sums cannot be recovered when they have been paid.

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quam alienam obligationem qualemcumque, sive veterem, sive novam in se suscipere." Hence it includes *adpromissio*, becoming surety for an old engagement, or *expromissio*, replacing an old one by a new one.

[1] This refers to *operae fabriles*: not to *operae officiales*, as we see from D. 12. 6. 26. 12.

[2] We read "*si* sine" in accordance with the Basilica.

43. Paulus libro tertio ad Plautium. Si quis iurasset se dare non oportere, ab omni contentione discedetur atque ita solutam pecuniam repeti posse dicendum est.

44. Idem libro quarto decimo ad Plautium. Repetitio nulla est ab eo qui suum recepit, tametsi ab alio quam uero debitore solutum est.

45. Iavolenus libro secundo ex Plautio. Si is, qui hereditatem uendidit et emptori tradidit, id, quod sibi mortuus debuerat, non retinuit, repetere poterit, quia plus debito solutum per condictionem recte recipietur.

46. Idem libro quarto ex Plautio. Qui heredis nomine legata non debita ex nummis ipsius heredis soluit, ipse quidem repetere non potest: sed si ignorante herede nummos eius tradidit, dominus, ait, eos recte uindicabit. eadem causa rerum corporalium est.

43. *Paulus.* If any one has made oath that he is not under obligation to give, there will be a stay to all proceedings; and so we must rule that money which has been paid can be recovered[1].

44. *Paulus.* There is no recovery from one who has received what belongs to him, although it has been paid by another person and not by the true debtor[2].

45. *Javolenus.* If a person, who has sold an inheritance and delivered it to the purchaser, has not retained what the dead man owed him, he can recover this; because what is paid in excess of a debt will be properly recovered by condiction.

46. *Javolenus.* A person who has paid, on the heir's account and with the heir's money, legacies which are not due, cannot himself recover; but if he paid the heir's money without his knowledge, the heir, he says, can lawfully bring a vindication for it[3]. The case is the same with corporeal things.

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[1] "Although the *exceptio juris jurandi* cannot destroy an obligation which naturally exists, yet it prevents enquiry into the question of its existence, and so has the same effect as if it destroyed it." Pothier.

[2] Sc. if it has been paid *alieno nomine*, or on the debtor's account.

[3] If he paid with the heir's consent, but for a cause which did not bind the heir, the heir has a *condictio*.

47. Celsus libro sexto digestorum. Indebitam pecuniam per errorem promisisti; eam qui pro te fideiusserat soluit. ego existimo, si nomine tuo soluerit fideiussor, te fideiussori, stipulatorem tibi obligatum fore: nec exspectandum est, ut ratum habeas, quoniam potes uideri id ipsum mandasse, ut tuo nomine solueretur: sin autem fideiussor suo nomine soluerit quod non debebat, ipsum a stipulatore repetere posse, quoniam indebitam iure gentium pecuniam soluit: quo minus autem consequi poterit ab eo cui soluit, a te mandati iudicio consecuturum, si modo per ignorantiam petentem exceptione non summouerit.

48. Idem libro sexto digestorum. Qui promisit, si aliquid a se factum sit uel cum aliquid factum sit, dare se decem, si, priusquam id factum fuerit, quod promisit dederit, non uidebitur fecisse quod promisit atque ideo repetere potest.

49. Modestinus libro tertio regularum. His solis pecu-

47. *Celsus.* You promised through error money which was not due, and a person who became surety for you paid it. I think that if the surety paid on your account, you will be under obligation to the surety[1], and the stipulator to you[2]: and we need not wait till you ratify the proceeding, since you may be considered to have given your mandate for the very purpose of payment being made on your account[3]. But if the surety paid on his own account what was not due, he can himself recover from the stipulator, since he has paid what was naturally no debt: but whatever amount he cannot recover from the man to whom he made payment, he can recover from you in an action on mandate, provided only it was through ignorance that he did not repel the plaintiff by an exception.

48. *Celsus.* If a person promised that he would give ten *aurei* if something were done by him or when something should have been done by him, and gave what he promised before the thing was done, he will not be considered to have been carrying out what he promised, and so can recover.

49. *Modestinus.* A condiction for money is brought

[1] *Ex causa mandati.*
[2] *Ex causa indebiti.*
[3] This is a reasonable implication from the fact that you gave him a mandate to be your surety.

nia condicitur, quibus quoquo modo soluta est, non quibus proficit.

50. Pomponius libro quinto ad Quintum Mucium. Quod quis sciens indebitum dedit hac mente, ut postea repeteret, repetere non potest.

51. Idem libro sexto ad Quintum Mucium. Ex quibus causis retentionem quidem habemus, petitionem autem non habemus, ea si soluerimus, repetere non possumus.

52. Idem libro uicensimo septimo ad Quintum Mucium. Damus aut ob causam aut ob rem: ob causam praeteritam, ueluti cum ideo do, quod aliquid a te consecutus sum uel quia aliquid a te factum est, ut, etiamsi falsa causa sit, repetitio eius pecuniae non sit: ob rem uero datur, ut aliquid sequatur, quo non sequente repetitio competit.

53. Proculus libro septimo epistularum. Dominus testamento seruo suo libertatem dedit, si decem det: seruo ignorante

against those persons only to whom in some manner or other it has been paid, and not against those who are benefited.

50. *Pomponius.* What a man has given, knowing that it is not due, and intending afterwards to recover it, he cannot recover[1].

51. *Pomponius.* Whenever we have a right of retention, but not a right of action, if we pay such things, we cannot recover them[2].

52. *Pomponius.* We give either for a reason or for a purpose: for a reason that is past, as when I give because I have obtained something from you, or because something has been done by you; so that, even if the reason be false, there is no recovery of the money: but a gift is for a purpose when it is in order that something may follow, and if it does not follow, recovery is allowable.

53. *Proculus.* A master in his testament granted liberty to his slave on condition of his giving ten *aurei* (to me): the

[1] See D. 46. 3. 50, where it is said that, if a man who owes gold pays bronze fraudulently, he cannot recover it; although the receiver, if he sues for the gold, must tender back the bronze.

[2] Gothofred's annotation is "retentio facti non juris," by which I understand him to mean a right to retain until claim is made, but no right, legal at any rate, to retain against a claim. As to a right of retention being legal or natural, the decision turns on whether it is or is not sufficient to found an *exceptio perpetua:* D. 12. 6. 26. 3.

id testamentum non ualere data sunt mihi decem: quaeritur, quis repetere potest. Proculus respondit: si ipse seruus peculiares nummos dedit, cum ei a domino id permissum non esset, manent nummi domini eosque non per condictionem, sed in rem actione petere debet. si autem alius rogatu serui suos nummos dedit, facti sunt mei eosque dominus serui, cuius nomine dati sunt, per condictionem petere potest: sed tam benignius quam utilius est recta uia ipsum qui nummos dedit suum recipere.

54. Papinianus libro secundo quaestionum. Ex his omnibus causis, quae iure non ualuerunt uel non habuerunt effectum, secuta per errorem solutione condictioni locus erit.

55. Idem libro sexto quaestionum. Si urbana praedia locauerit praedo, quod mercedis nomine ceperit, ab eo qui soluit non repetetur, sed domino erit obligatus. idemque iuris

slave not knowing that the testament was invalid, the ten *aurei* were given to me: the question is, who can recover them. Proculus replied: if the slave himself gave money out of his *peculium*, although his master[1] had not granted him permission to do so, the money remains the property of his master; who must recover it, not by condiction, but by real action[2]. But if some one else gave his own money at the slave's request it was made my property; and the owner of the slave, on whose account it was given, can claim it by condiction: but it is both more fair and more convenient that the man who gave the money should recover his own property directly[3].

54. *Papinian.* If payment has been made by mistake for any cause which has become invalid or inefficacious through the operation of law, there will be ground for a condiction.

55. *Papinian.* If a wrongful possessor has let buildings, the money which he has received as rent cannot be recovered from him by the payer, but he will be answerable for it to the owner (of the buildings). The same will also be the rule as to

[1] Sc. the *heres ab intestato* of the testator.

[2] Unless it has been consumed, for then there is a condiction.

[3] Sc. by an *utilis actio indebiti*, and not by an *actio negotiorum gestorum* brought against the *dominus*.

erit in uecturis nauium, quas ipse locauerit aut exercuerit, item mercedibus seruorum, quorum operae per ipsum fuerint locatae. nam si seruus non locatus mercedem ut domino praedoni rettulit, non fiet accipientis pecunia. quod si uecturas nauium, quas dominus locauerat, item pensiones insularum acceperit, ob indebitum ei tenebitur, qui non est liberatus soluendo. quod ergo dici solet praedoni fructus posse condici, tunc locum habet, cum domini fructus fuerunt.

56. IDEM libro octauo quaestionum. Sufficit ad causam indebiti incertum esse, temporaria sit an perpetua exceptionis defensio. nam si qui, ne conueniatur, donec Titius consul fiat, paciscatur, quia potest Titio decedente perpetua fieri exceptio, quae ad tempus est Titio consulatum ineunte, summa ratione dicetur, quod interim soluitur, repeti: ut enim pactum, quod in

the freight of ships which he[1] has let out or worked; and as to the hire of slaves whose labour has been let out by him. For if a slave, not let out[2], has brought his earnings to the unlawful possessor, as being his master, the money will not become the property of the receiver. So too, if he has received the freight of ships, which the owner let out, or the rents of buildings, he will be liable, on the score of money not due, to him who is not acquitted by the payment. Hence, the common saying, that fruits can be recovered by condiction from an unlawful possessor, applies to the case when the fruits belonged to the owner[3].

56. *Papinian.* To make money not due it is sufficient for it to be doubtful whether the preventing power of an exception is temporary or perpetual. For if a man makes an agreement that he is not to be sued until Titius becomes consul; as the exception may become perpetual by the death of Titius, whilst it is temporary only, if Titius enters on the consulship; it may be said most reasonably that there is recovery of what is paid during the pendency of the condition: for just as a pact[4], when made to depend on a fixed day, no more gives rise

[1] Sc. *praedo.*

[2] Sc. not let out by the *praedo:* a slave who has hired *himself* out.

[3] The fruits, obviously, belong to the owner in any case: but the meaning of Papinian must be that the fruits were known to belong to the owner, and the mistake was in supposing the *praedo* to be agent for the owner. There is no condiction, if he acts as owner, and the payer deals with him on that supposition.

[4] Sc. a *pactum de non petendo.* If there is a pact not to sue before a certain date, the debtor who pays before the date cannot recover; be-

tempus certum collatum est, non magis inducit condictionem, quam si ex die debitor soluit, ita prorsus defensio iuris, quae causam incertam habet, condictionis instar optinet.

57. Idem libro tertio responsorum. Cum indebitum impuberis nomine tutor numerauit, impuberis condictio est. (1.) Creditor, ut procuratori suo debitum redderetur, mandauit: maiore pecunia soluta procurator indebiti causa conuenietur: quod si nominatim, ut maior pecunia solueretur, delegauit, indebiti cum eo qui delegauit erit actio, quae non uidetur perempta, si frustra cum procuratore lis fuerit instituta.

58. Idem libro nono responsorum. Seruo manumisso fideicommissum ita reliquit, si ad libertatem ex testamento peruc-

to a condiction than does the debtor's payment after the date; so too a defence of law which is of uncertain character[1] is equivalent to a condition.

57. *Papinian.* When a guardian has paid on account of his ward what is not due, the condiction belongs to the ward[2]. 1. A creditor gave commission for a debt to be paid to his agent: if too large a sum has been paid, the agent can be sued for money not due. But if the creditor gave express authority for the extra sum to be paid, the action for money not due will lie against him who gave the authority; and this action does not seem to be debarred, if a suit has been brought fruitlessly against the agent[3].

58. *Papinian.* A person bequeathed a sum in trust for a manumitted slave, on condition of the slave's obtaining his liberty by virtue of his testament: after he had received the

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cause he has paid what is certain to become due eventually: see D. 12. 6. 10. If there is a pact not to sue before a date, which may never come to pass, recovery is allowed: D. 12. 6. 16. 1. Hence Papinian's argument is that a condition and a date are very much alike in law: a condition certain to come to pass is no condition at all, and resembles a fixed date in not giving rise to a condiction on account of premature payment; a condition proper, i.e. one that is uncertain of fulfilment, gives rise to a condiction, and so also does a purely problematical date, if payment is made too soon.

[1] "Quae causam incertam habet = de qua incertum est, an perpetuo excludat actionem necne." Pothier.

[2] It is a general rule that the condiction is granted to the person on whose behalf the payment is made, and not of necessity to the actual payee. C. 4. 5. 6.

[3] The payment, in so far as the agent has authority, is a payment to the principal. See C. 4. 5. 2: D. 46. 3. 34. *pr.*

nerit: post acceptam sine iudice pecuniam ingenuus pronuntiatus est: indebiti fideicommissi repetitio erit.

59. IDEM libro secundo definitionum. Si fideiussor iure liberatus soluerit errore pecuniam, repetenti non oberit: si uero reus promittendi per errorem et ipse postea pecuniam soluerit, non repetet, cum prior solutio, quae fuit irrita, naturale uinculum non dissoluit, nec ciuile, si reus promittendi tenebatur.

60. PAULUS libro tertio quaestionum. Iulianus uerum debitorem post litem contestatam manente adhuc iudicio negabat soluentem repetere posse, quia nec absolutus nec condemnatus repetere posset: licet enim absolutus sit, natura tamen debitor permanet: similemque esse ei dicit, qui ita promisit, siue nauis ex Asia uenerit siue non uenerit, quia ex una causa

money without litigation[1], he was declared to be freeborn: there will be recovery of the trust-bequest, as not due.

59. *Papinian.* If a surety, released by operation of law, has paid money through mistake, there is no reason why he should not recover it: but if the principal debtor also himself pays subsequently through mistake, he will not recover, because the first payment, being void, has not dissolved either the natural or the civil obligation, if the principal debtor was bound[2].

60. *Paulus.* Julian says that a genuine[3] debtor, who pays after *litis contestatio* whilst the suit is still pending, cannot recover: because, whether acquitted or condemned, he has no right to recover. For even if he be acquitted, still he remains a debtor by natural law: and he says that he resembles the man who promised on condition "that a ship came from Asia or did not come": because on the single condition[4] a ground

[1] If he had received it by judgment, it could not have been treated as *indebitum:* see D. 17. 1. 29. 5: C. 4. 5. 1.

[2] The principal debtor is certainly bound naturally, and, if all has been done in order, is also bound civilly: the payment made by the surety, who has been discharged by operation of law, does not affect the obligation of the principal debtor, be that obligation of the one kind or the other.

[3] *Verus*=bound by natural law at any rate, whether or not bound civilly.

[4] Sc. the single condition, which in itself was a double one: "sive navis venerit sive non." The wording of the sentence is somewhat crabbed, but the sense, even as it stands, is not obscure. It has been suggested, though without MS. authority, to read "una causa alterave," which would give the same meaning in a more usual mode of

alterius solutionis origo proficiscitur. (1.) Ubi autem quis quod pure debet sub condicione nouandi animo promisit, plerique putant pendente nouatione solutum repetere posse, quia ex qua obligatione soluat, adhuc incertum sit: idemque esse etiam, si diuersas personas ponas eandem pecuniam pure et sub condicione nouandi animo promisisse. sed hoc dissimile est: in stipulatione enim pura et conditionali eundem debiturum certum est.

61. Scaevola libro quinto responsorum. Tutores pupilli quibusdam creditoribus patris ex patrimonio paterno soluerunt, sed postea non sufficientibus bonis pupillum abstinuerunt: quaeritur, an quod amplius creditoribus per tutores pupilli solutum est uel totum quod acceperunt restituere debeant. re-

for one payment or the other arises. 1. But when a man who owes something absolutely, has promised with the intent of novating conditionally, most lawyers think that he can recover what has been paid while the novation is yet in suspense; because under which obligation he is paying is at present uncertain[1]. And that the same is the case also, if you suppose different persons to have promised the same money, (one) absolutely, and (the other), with the intent of novating conditionally. But this is a different case. For in a stipulation that is both absolute and conditional, it is obvious that the same man will owe the money[2].

61. *Scaevola.* The guardians of a pupil paid certain of his father's creditors out of his father's estate: but afterwards made the ward renounce the inheritance, because the goods were insufficient (to pay the debts in full). It is asked whether the creditors are bound to refund the excess of what was paid them by the guardians of the pupil, or the whole of what they

wording. That meaning clearly is that if he pays, and is subsequently condemned, he has paid what is due both civilly and naturally; and even if he is acquitted, he has paid what is due naturally.

[1] See *Gai. Comm.* 3. 179.

[2] When there are two promisers, one promising absolutely, and the other conditionally, the latter is not bound at all, not even naturally, till the condition comes to pass: but when one man, already absolutely bound, promises conditionally, he is clearly bound even prior to the vesting of the condition. Hence the cases are not similar, for in the first there is no doubt as to the debtor being bound, though we cannot say under which obligation; in the second, one debtor is bound till the condition vests, and even then is not free; the other is free till the condition vests, and is then bound.

spondi, si nihil dolo factum esset, tutori quidem uel pupillo non deberi, creditoribus autem aliis in id, quod amplius sui debiti solutum est, teneri.

62. Maecianus libro quarto fideicommissorum. Fideicommissum in stipulatione deductum tametsi non debitum fuisset, quia tamen a sciente fidei explendae causa promissum esset, debetur.

63. Gaius libro singulari de casibus. Neratius casum re fert, ut quis id quod soluerit repetere non possit, quasi debitum dederit, nec tamen liberetur: uelut si is, qui cum certum hominem deberet, statuliberum dederit: nam ideo eum non liberari, quod non in plenum stipulatoris hominem fecerit, nec tamen repetere eum posse, quod debitum dederit.

64. Tryphoninus libro septimo disputationum. Si quod dominus seruo debuit, manumisso soluit, quamuis existimans ei

received. I replied: if there was no fraudulent conduct they are not bound to refund to the guardian or the pupil[1]; but they are bound to the other creditors for the amount paid to them in excess of their debt.

62. *Maecian.* When a *fideicommissum* has been converted into a stipulation, although it was not due, yet since it was promised by the trustee with knowledge, in order that he might carry into effect his trust, it becomes due.

63. *Gaius.* Neratius mentions an instance where a man cannot recover what he has paid, inasmuch as he has paid what is due, and yet is not acquitted: for example, supposing he who owes a particular slave gives him when he is a *statuliber:* for he is not acquitted, because he has not made the slave fully the property of the stipulator; and yet he cannot recover him, because he has paid what is due[2].

64. *Tryphoninus.* If a master pays to a slave after his manumission what he owed him previously, even though (he

[1] As the inheritance has been renounced, neither the pupil nor the guardians have any interest.

[2] The slave must be understood to become a *statuliber* through the act of the debtor, or through an act for which the debtor is responsible. Pothier suggests a case in point, viz. that the owner of a slave is under obligation to give him to another person, and instead of doing so makes a testament in which he gives the slave freedom upon some condition: the heir then gives the slave as a *statuliber* to the promisee.

aliqua teneri actione, tamen repetere non poterit, quia naturale adgnouit debitum : ut enim libertas naturali iure continetur et dominatio ex gentium iure introducta est, ita debiti uel non debiti ratio in condictione naturaliter intellegenda est.

65. Paulus libro septimo decimo ad Plautium. In summa, ut generaliter de repetitione tractemus, sciendum est dari aut ob transactionem aut ob causam aut propter condicionem aut ob rem aut indebitum : in quibus omnibus quaeritur de repetitione. (1.) Et quidem quod transactionis nomine datur, licet res nulla media fuerit, non repetitur : nam si lis fuit, hoc ipsum, quod a lite discedit, causa uidetur esse. sin autem euidens calumnia detegitur et transactio imperfecta est, repetitio dabitur. (2.) Id quoque, quod ob causam datur, puta quod negotia mea adiuta ab eo putaui, licet non sit factum, quia donari uolui, quamuis falso mihi persuaserim, repeti non posse.

pays) under the impression that he is liable to him in some action, he cannot recover; because he has acknowledged a natural obligation : for as liberty is a matter of natural law, and ownership (over human beings) was introduced by the custom of mankind[1], the determination of debt or no debt must be settled in the condiction from the natural stand-point.

65. *Paulus.* In brief, to speak generally of recovery, we must take note that a thing is given either on account of compromise, or for a reason[2], or upon a condition, or for a purpose[3], or without being due : in all of which cases the question of recovery arises. 1. And firstly, what is given by way of compromise is not recovered, even though there was no matter for dispute[4] : for if there was a suit, the very fact that the suit is abandoned is considered to be a reason. But if vexatious conduct be plainly detected, and the compromise be void, a recovery will be allowed[5]. 2. That again which is given for a reason, for instance, because I thought my business had been helped by a man, even though such was not the case, cannot be recovered ; because I meant to make him a gift, although I

[1] See Just. *Inst.* 1. 5. *pr.*

[2] Ob causam *praeteritam :* D. 12. 6. 52.

[3] Ob rem, ut aliquid sequatur, i.e. *futuram.* D. 12. 6. 52.

[4] Sc. even if the compromise was not based upon a real debt or obligation, but on an imaginary one. There is at any rate the *proxima causa* that the defendant gets rid of the annoyance of having to defend.

[5] C. 1. 18. 6.

(3.) Sed agere per condictionem propter condicionem legati uel hereditatis, siue non sit mihi legatum siue ademptum legatum, possum, ut repetam quod dedi, quoniam non contrahendi animo dederim, quia causa, propter quam dedi, non est secuta. idem et si hereditatem adire nolui uel non potui. non idem potest dici, si seruus meus sub condicione heres institutus sit et ego dedero, deinde manumissus adierit: nam hoc casu secuta res est. (4.) Quod ob rem datur, ex bono et aequo habet repetitionem: ueluti si dem tibi, ut aliquid facias, nec feceris. (5.) Ei, qui indebitum repetit, et fructus et partus restitui debet deducta impensa. (6.) In frumento indebito soluto et bonitas est et, si consumpsit frumentum, pretium repetet. (7.) Sic habitatione data pecuniam condicam, non quidem

acted under a false impression. 3. But I can sue by condiction on account of the condition of a legacy or inheritance, to recover what I gave[1], in case the legacy was either not bequeathed to me or was taken away from me; since I did not give with intent to make a contract[2], seeing that the purpose for which I gave has not come to pass. So too is it, if I have been unwilling or unable to enter upon an inheritance. The same cannot be said, if my slave has been appointed heir upon condition, and I have given (something, in order to fulfil the condition), and then he enters after being manumitted: for in this case my purpose has been carried into effect. 4. What is given for a purpose is recoverable according to fairness and equity; for example, if I give you something that you may do a certain act, and you do not do it. 5. Both fruits and offspring must be restored to him who recovers what is not owing, but expenses must be set off. 6. Quality is taken into account, when corn that is not due has been paid; and if the corn has been consumed, its value can be recovered. 7. So too, when a right of habitation has been given by way of payment, although not due, I can sue for money; but not for the

[1] Sc. I can sue to recover what I gave in order that I might receive a legacy or inheritance left to me upon condition of so giving.

[2] I did not give with absolute intent to bind myself, but only with intent to bind myself under a certain condition, which condition has failed to take effect. In other words, I did not *buy* the inheritance or legacy, subject to the risk of ademption; but I paid to have the inheritance or legacy, *if* any inheritance or legacy really existed.

quanti locari potuit, sed quanti tu conducturus fuisses. (8.) Si seruum indebitum tibi dedi eumque manumisisti, si sciens hoc fecisti, teneberis ad pretium eius, si nesciens, non teneberis, sed propter operas eius liberti et ut hereditatem eius restituas. (9.) Indebitum est non tantum, quod omnino non debetur, sed et quod alii debetur, si alii soluatur, aut si id quod alius debebat alius quasi ipse debeat soluat.

66. Papinianus libro octauo quaestionum. Haec condictio ex bono et aequo introducta, quod alterius apud alterum sine causa deprehenditur, reuocare consueuit.

67. Scaevola libro quinto digestorum. Stichus testamento eius, quem dominum suum arbitrabatur, libertate accepta, si decem annis ex die mortis annuos decem heredibus praestitisset, per octo annos praefinitam quantitatem ut iussus

amount for which I could have let the house, but for the amount at which you would have hired it[1]. 8. If I have given to you a slave who was not due, and you have manumitted him; supposing you did this knowing (that he was not due), you will be liable for his price[2]; but supposing you did so without knowledge, you will not be liable, except for the services of the freedman and to make over his inheritance[3]. 9. Not only is a thing not due when it is not owed at all, but also when it is due to one man and paid to another, or when one man owed it and another pays it, under the impression that himself is the debtor.

66. *Papinian.* This condiction, introduced on account of fairness and equity, is the usual method for recovering property of one person found without cause in another's hands.

67. *Scaevola.* Stichus, having received his freedom under the testament of the person whom he believed to be his master, on condition that he should pay ten *aurei* a year to his heirs for ten years from his death, gave the appointed amount, as he

[1] Because the *condictio indebiti* is for the amount of profit: *in quantum quis est locupletior tenetur*. See D. 12. 6. 26. 12.

[2] That is to say, if you received him under the belief he was due to you, but learned that he was not due before you manumitted him. If you took him with knowledge that he was not due, you are liable to the *actio furti*, as well as the *condictio furtiva*.

[3] Which devolves on you entirely, if he dies childless and intestate, and partially in other cases. See Gaius 3. 40—42.

erat dedit, postmodum se ingenuum comperit nec reliquorum annorum dedit et pronuntiatus est ingenuus: quaesitum est, an pecuniam, quam heredibus dedit, ut indebitam datam repetere et qua actione possit. respondit, si eam pecuniam dedit, quae neque ex operis suis neque ex re eius, cui bona fide seruiebat, quaesita sit, posse repeti. (1.) Tutor creditori pupilli sui plus quam debebatur exsoluit et tutelae iudicio pupillo non imputauit: quaero an repetitionem aduersus creditorem haberet. respondit habere. (2.) Titius cum multos creditores haberet, in quibus et Seium, bona sua priuatim facta uenditione Maeuio concessit, ut satis creditoribus faceret: sed Maeuius soluit pecuniam Seio tamquam debitam, quae iam a Titio fuerat soluta: quaesitum est, cum postea repperiantur apochae apud Titium debitorem partim solutae pecuniae, cui magis repetitio pecuniae indebitae solutae competit, Titio debitori an Maeuio, qui in

was directed, for eight years. Afterwards he discovered that he was freeborn, and did not pay for the remaining years, and was adjudged freeborn. It was asked whether he could recover as never due the money which he had given to the heirs, and if so by what action? The answer was, if he gave money which was acquired neither by his own labour nor in connection with the property of a person whom he served in good faith, he could recover it. 1. A guardian paid to the creditor of his ward more than was due, and in an action on the tutelage did not charge the money against the ward: I ask whether he would have recovery from the creditor? The answer was that he would[1]. 2. Titius, having several creditors, and amongst them Seius, assigned all his goods privately to Maevius by sale, in order that Maevius might settle with his creditors; but Maevius paid to Seius a sum of money, as though due, which had already been paid by Titius. The question arose, when receipts were afterwards found in the possession of the debtor, Titius, for part payment of the money, which of the two had the right to recover the money paid, although not due, Titius, the debtor, or Maevius, who was made agent for his own

[1] Sc. by *utilis condictio indebiti*. The tutor is supposed to have paid the debt *suo nomine*: if he had paid it *pupilli nomine*, the latter would have had the *condictio*. D. 12. 6. 57. *pr*.

rem suam procurator factus est. respondit secundum ea quae proponerentur ei, qui postea soluisset. (3.) Idem quaesiit, an pactum, quod in pariationibus adscribi solet in hunc modum 'ex hoc contractu nullam inter se controuersiam amplius esse' impediat repetitionem. respondit nihil proponi, cur impediret. (4.) Lucius Titius Gaio Seio minori annis uiginti quinque pecuniam certam credidit et ab eo aliquantum usurarum nomine accepit, et Gaii Seii minoris heres aduersus Publium Maeuium a praeside prouinciae in integrum restitutus est, ne debitum hereditarium solueret, et nec quicquam de usuris eiusdem sortis, quas Seius minor annis uiginti quinque exsolueret, repetendis tractatum apud praesidem aut ab eo est pronuntiatum: quaero, an usuras, quas Gaius Seius minor annis uiginti quinque quoad uiueret creditori exsolueret, heres eius repetere possit. respondit secundum ea quae proponerentur condici id,

benefit? It was answered, that according to the circumstances stated, the one who made the second payment could recover. 3. It was also asked whether the pact usually introduced into settlements of account[1], "that on this matter there shall be no further controversy between the parties," prevents recovery. It was answered that nothing was stated which would prevent this[2]. 4. Lucius Titius lent a certain sum of money to Gaius Seius, who was under twenty-five years of age, and received from him a certain amount by way of interest; and the heir of Gaius Seius, the minor, obtained from the governor of the province *restitutio in integrum* against Publius Maevius, in order that he might not have to pay the inherited debt; but there was no mention made before the governor, and no decree issued by him, as to the recovery of the interest on the said principal, which Seius had paid whilst under twenty-five years of age. I wish to know whether the heir can recover the interest which Gaius Seius the minor paid to the creditor during his life-time. It was answered, that according to the case propounded there could be no condiction for what the dead man

[1] *Pariatio=debitorum ac nominum exaequatio.* Dirksen.

[2] The *pariatio* is merely a settlement according to the rules of arithmetic, but does not affect the question of the account being legally due or not due.

quod usurarum nomine defunctus soluisset, non posse. item quaero, si existimes repeti non posse, an ex alio debito heres retinere eas possit. respondit ne hoc quidem.

had paid by way of interest[1]. I also wish to know, if you think there could be no recovery, whether the heir can retain it out of another debt. The answer was that not even this could be done.

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[1] Because it had not been claimed in the application for *restitutio in integrum*, and was due morally.

DE CONDICTIONE SINE CAUSA.

D. 12. 7.

1. Ulpianus libro quadragensimo tertio ad Sabinum. Est et haec species condictionis, si quis sine causa promiserit uel si soluerit quis indebitum. qui autem promisit sine causa, condicere quantitatem non potest quam non dedit, sed ipsam obligationem. (1.) Sed et si ob causam promisit, causa tamen secuta non est, dicendum est condictionem locum habere. (2.) Siue ab initio sine causa promissum est, siue fuit causa promittendi quae finita est uel secuta non est, dicendum est condictioni locum fore. (3.) Constat id demum

1. *Ulpian.* The variety of condiction available, if any one has promised without cause, can also be employed, even when a person has paid what is not due[1]. But he who has (merely) promised without cause cannot bring a condiction for an amount, because he has not given one, but must bring one for (rescission of) the obligation. 1. And again, if he promised for a cause, and the cause has not come to pass, we must allow that this condiction will apply[2]. 2. So, whether the promise was originally without cause, or there was a cause for promising, which came to an end or did not take effect, we must allow that there is opportunity for this condiction. 3. It is well

[1] Sc. the *condictio sine causa* is concurrent with the *condictio indebiti*.

[2] Sc. the *condictio sine causa* is concurrent with that *causa data causa non secuta*.

posse condici alicui, quod uel non ex iusta causa ad eum peruenit uel redit ad non iustam causam.

2. IDEM libro trigensimo secundo ad edictum. Si fullo uestimenta lauanda conduxerit, deinde amissis eis domino pretium ex locato conuentus praestiterit posteaque dominus inuenerit uestimenta, qua actione debeat consequi pretium quod dedit? et ait Cassius eum non solum ex conducto agere, uerum condicere domino posse: ego puto ex conducto omnimodo eum habere actionem: an autem et condicere possit, quaesitum est, quia non indebitum dedit: nisi forte quasi sine causa datum sic putamus condici posse: etenim uestimentis inuentis quasi sine causa datum uidetur.

3. IULIANUS libro octauo digestorum. Qui sine causa

established that a man is liable to this condiction only on account of something which has come to him for no proper cause[1], or for a cause which becomes an improper cause.

2. *Ulpian.* If a fuller contracted to scour garments, and was sued *ex locato* when the garments were lost, and paid the price to the owner, and the owner subsequently found the garments; by what action ought he to recover the price which he paid? Cassius says that he can not only sue *ex conducto*, but can also bring a condiction against the owner[2]. I think he certainly has the action *ex conducto*[3]; but it has been doubted whether he can also bring a condiction, seeing that he did not give what was not due: unless, indeed, we think that there can be a condiction on account of the gift being without cause, for when the garments are found it seems to have been given without cause.

3. *Julian.* Those who bind themselves without cause,

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[1] Hence the *condictio sine causa* is concurrent with that *ob injustam causam*.

[2] Cujas says that the *condictio sine causa* cannot be concurrent with another action, but only employed when other remedies fail (*ad Afric. Tract.* 2). The present passage, however, militates against his theory, and we have already seen that this *condictio* can be concurrent with other *condictiones*.

[3] Pothier remarks that in the *actio ex conducto*, as in all other *bonae fidei* actions, there can be a claim on the implied undertaking "dolum malum abesse, abfuturumque esse." The *locator* therefore who attempts to keep both the money he received and the garments he has recovered is guilty of *dolus*.

obligantur, incerti condictione consequi possunt ut liberentur: nec refert, omnem quis obligationem sine causa suscipiat an maiorem quam suscipere eum oportuerit, nisi quod alias condictione id agitur, ut omni obligatione liberetur, alias ut exoneretur: ueluti qui decem promisit, nam si quidem nullam causam promittendi habuit, incerti condictione consequitur, ut tota stipulatio accepto fiat, at si, cum quinque promittere deberet, decem promisit, incerti consequetur, ut quinque liberetur.

4. Africanus libro octauo quaestionum. Nihil refert, utrumne ab initio sine causa quid datum sit an causa, propter quam datum sit, secuta non sit.

5. Papinianus libro undecimo quaestionum. Auunculo nuptura pecuniam in dotem dedit neque nupsit: an eandem repetere possit, quaesitum est. dixi, cum ob turpem causam dantis et accipientis pecunia numeretur, cessare condictionem et in delicto pari potiorem esse possessorem: quam rationem

can by *condictio incerti*[1] obtain their release: and it matters not whether a man takes on himself an obligation that is altogether groundless or one greater than he ought to undertake, except that the object of the condiction is in the one case that he may be released from the whole obligation, in the other that he may be relieved. For instance, a person who has promised ten *aurei*, if he had no cause at all for promising, obtains by means of the *condictio incerti* an acquittance from the entire stipulation; but if he promised ten when he ought to have promised five, he will obtain by the *condictio incerti* a release from five.

4. *Africanus.* It is immaterial whether a gift be originally without reason or the reason for which it was made do not take effect.

5. *Papinian.* A woman, purposing to be married to her uncle, gave him money as a marriage-portion, and then was not married to him. It was asked whether she could recover it. I replied, when money is paid for a reason disgraceful both to giver and receiver, the condiction will not apply: and the turpitude being equal, the possessor has the better title.

[1] Sc. *condictio sine causa incerti*, for the *condictio sine causa*, like the other condictions, can be *certi*, *triticaria* or *incerti*.

fortassis aliquem secutum respondere non habituram mulierem condictionem: sed recte defendi non turpem causam in proposito quam nullam fuisse, cum pecunia quae daretur in dotem conuerti nequiret: non enim stupri, sed matrimonii gratia datam esse. (1.) Nouerca priuigno, nurus socero pecuniam dotis nomine dedit neque nupsit. cessare condictio prima facie uidetur, quoniam iure gentium incestum committitur: atquin uel magis in ea specie nulla causa dotis dandae fuit, condictio igitur competit.

And following this reasoning, one might perhaps decide that the woman cannot have a condiction; but I think it might be fairly maintained that in the case proposed the reason was not so much disgraceful as void, since the money which was given could not be converted into a marriage-portion; for it was not given in view of illicit cohabitation, but in view of marriage[1]. 1. A stepmother gave money as a marriage portion to her stepson, or a daughter-in-law to her father-in-law; and did not marry him. At first sight it appears that the condiction has no place, since incest, recognized as such by the *jus gentium*, is committed. But even in this case, there was rather no cause (than a disgraceful cause) for giving the marriage-portion; therefore the condiction is allowed.

[1] The question suggests itself, did the woman know that her intended husband was her uncle; and supposing she knew this, was she also aware of the law forbidding such a marriage? Some commentators say, if she knew the fact and the law, she gave for the purpose of illicit cohabitation, therefore *ob turpem causam*, and hence cannot recover. They admit, however, that if she knew the fact and not the law, she probably has recovery, for her gift is then merely *sine causa* and not *ob turpem causam*. But Azo, and the majority of commentators, are right in saying that these considerations are immaterial: the woman gave the money to be *dos*, and *dos* can only exist in the case of marriage, not in the case of illicit cohabitation; so her knowledge or ignorance is immaterial. The cases in § 1 shew conclusively that Azo's view is the correct one: a woman is presumed to know the principles of the *jus gentium*, whatever be the extent to which she is excused ignorance of the *jus civile;* she can scarcely be ignorant of the fact that a man is her father-in-law or stepson, and yet, although acquainted with both fact and law, she is allowed the *condictio sine causa*.

DE CONDICTIONE FURTIVA.

D. 13. 1.

1. Ulpianus libro octauo decimo ad Sabinum. In furtiua re soli domino condictio competit.

2. Pomponius libro sexto decimo ad Sabinum. Condictione ex causa furtiua et furiosi et infantes obligantur, cum heredes necessarii exstiterunt, quamuis cum eis agi non possit.

1. *Ulpian.* In respect of a thing stolen the condiction is allowed to none but the owner[1].

2. *Pomponius.* Both madmen and infants are liable to a condiction on the ground of theft, when they are *heredes necessarii*, although the action[2] cannot be brought against themselves.

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[1] See also D. 47. 2. 14. 16. The *condictio furtiva* therefore differs essentially from the other condictions; for these are granted to *non-owners*, who, once having been owners, have lost their ownership for some reason of which the law disapproves. Theft does not change the ownership; hence the condiction is in reality for recovery of *possession*, if the stolen article is existent and traceable; and for its value only when it has disappeared. The rule that none but the owner can sue does not, however, apply to a *tutor* or *curator:* D. 47. 2. 58. 4.

[2] Sc. the *condictio furtiva*. It is brought against them in their capacity of heirs, but could not be brought against them *suo nomine*, even if they had misappropriated anything wrongfully; for there is an absolute presumption against their malice, and so they cannot commit a *furtum*, which requires an evil intention as well as a prohibited act. *Actio* cannot mean in this passage the *actio furti*, for it is too obvious that this, being a personal action on a delict, dies with the wrongdoer.

3. PAULUS libro nono ad Sabinum. Si condicatur seruus ex causa furtiua, id uenire in condictionem certum est quod intersit agentis, ueluti si heres sit institutus et periculum subeat dominus hereditatis perdendae. quod et Iulianus scribit. item si mortuum hominem condicat, consecuturum ait pretium hereditatis.

4. ULPIANUS libro quadragensimo primo ad Sabinum. Si seruus uel filius familias furtum commiserit, condicendum est domino id quod ad eum peruenit: in residuum noxae seruum dominus dedere potest.

5. PAULUS libro nono ad Sabinum. Ex furtiua causa filio familias condici potest: numquam enim ea condictione alius quam qui fecit tenetur aut heres eius.

6. ULPIANUS libro trigensimo octauo ad edictum. Pro-

3. *Paulus.* If a slave be claimed in a condiction on the ground of theft, it is certain that the measure of the action is the interest of the plaintiff; as, for example, when the slave has been appointed heir, and his master runs a risk of losing the inheritance. So also says Julian; and he adds that if he brings the condiction for a dead slave, he will recover the value of the inheritance[1].

4. *Ulpian.* If a slave or a *filiusfamilias* has committed a theft, the condiction must be brought against the master for what has reached his hands; for anything further[2] the owner can make noxal surrender of the slave.

5. *Paulus.* A condiction can be brought against a *filius-familias* on the ground of theft: for to this condiction no other person is ever liable except the delinquent or his heir.

6. *Ulpian.* In fact even though a theft be committed

[1] Only if the slave died after the testament was opened, the reason for recovery being the presumption that, if he had been in his owner's possession, he would have been ordered to enter on the inheritance.

[2] Pothier objects to the interpretation of *in residuum* as "for the balance of the amount claimed in the *condictio furtiva*," holding that no more can be obtained in that suit than the amount which has reached the master; but surely the master is liable to the value of the slave and his *peculium*, and I think Voet and the older commentators are in the right when they say, in opposition to Pothier, that the master must pay in full when sued by *condictio furtiva*, or pay what he can and make noxal surrender of the slave for the balance.

inde etsi ope consilio alicuius furtum factum sit, condictione non tenebitur, etsi furti tenetur.

7. IDEM libro quadragensimo secundo ad Sabinum. Si pro fure damnum decisum sit, condictionem non impediri uerissimum est: decisione enim furti quidem actio, non autem condictio tollitur. (1.) Furti actio poenam petit legitimam, condictio rem ipsam. ea res facit, ut neque furti actio per condictionem neque condictio per furti actionem consumatur. is itaque, cui furtum factum est, habet actionem furti et condictionem et uindicationem, habet et ad exhibendum actionem. (2.) Condictio rei furtiuae, quia rei habet persecutionem, heredem quoque furis obligat, nec tantum si uiuat seruus furtiuus, sed etiam si decesserit: sed et si apud furis heredem diem suum obiit seruus furtiuus uel non apud ipsum, post mortem

with the aid and counsel of any one, he will not be liable to the condiction, although liable for theft[1].

7. *Ulpian.* If a payment has been made in satisfaction for a theft, it is most indisputable that the condiction is not thereby estopped; for by the satisfaction the *actio furti* is certainly barred, but not the condiction. 1. The *actio furti* is for the obtaining of the penalty appointed by law, the condiction for the article itself. Hence it results that neither is the *actio furti* destroyed by the condiction, nor the condiction by the *actio furti*. He, therefore, upon whom a theft has been committed has the *actio furti*, the condiction and the vindication[2]; he has also the *actio ad exhibendum*. 2. The condiction for the stolen article, being for recovery of property, can be brought even against the heir of the thief; and not only if the stolen slave be still alive, but even if he be dead: and whether the stolen slave died in the possession of the heir, or

[1] This statement seems in conflict with D. 50. 16. 53. 2: "aliud factum est eius qui ope, aliud eius qui consilio furtum facit; sic enim alii condici potest, alii non potest." Gothofred's explanation is that the passage in D. 50. 16 takes for granted that the stolen article has come into the hands of the accomplice, and D. 13. 1. 6 that it has not. Another explanation is that "ope consilio" in the present passage is carelessly written for "consilio." The first of these explanations seems the better one; Pothier, however, inclines to the other.

[2] If the article is still existent the owner has an option between the *vindicatio* and the *condictio*: but, of course, he cannot sue in both ways; he must elect.

tamen furis, dicendum est condictionem aduersus heredem durare. quae in herede diximus, eadem erunt et in ceteris successoribus.

8. IDEM libro uicensimo septimo ad edictum. In re furtiua condictio ipsorum corporum competit: sed utrum tamdiu, quamdiu exstent, an uero et si desierint esse in rebus humanis? et si quidem optulit fur, sine dubio nulla erit condictio: si non optulit, durat condictio aestimationis eius: corpus enim ipsum praestari non potest. (1.) Si ex causa furtiua res condicatur, cuius temporis aestimatio fiat, quaeritur. placet tamen id tempus spectandum, quo res umquam plurimi fuit, maxime cum deteriorem rem factam fur dando non liberatur:

not in his possession, but still after the death of the thief, we must allow that the condiction stands good against the heir. And what we have said about the heir, will also apply to all other successors[1].

8. *Ulpian.* When a theft has been committed a condiction of the articles themselves is allowed; but is this the case only so long as they are in existence, or even if they have ceased to exist? If the thief tendered the thing[2], undoubtedly there will be no condiction; if he did not tender it, there remains a condiction for its value; for the article itself cannot be delivered[3]. 1. If a condiction be brought for anything on the ground of theft, the question arises, at what time is its value to be reckoned? And the rule is that the time must be regarded when the thing was of the greatest value[4], especially since the thief is not acquitted by delivering the article in a depreciated condition,

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[1] Sc. *general* successors, not *particular* successors: or, as Gothofred says: "scilicet in jus non in rem." See D. 13. 1. 5.

[2] By tendering the stolen thing, the thief terminates his default: "suam moram purgat."

[3] See C. 2. 20. 1: C. 4. 8. 2.

[4] We must understand this to mean the highest value the thing has borne since the theft was committed. From D. 47. 1. 2. 3 it has been plausibly argued that the highest value after the condiction has been brought is the value to be taken; but probably, as the action could be instituted the moment after the theft was committed, we may take *judicii accipiendi tempus* to mean the time of the commission; for the words of D. 47. 1. 2. 3 shew that the contrast between the *condictio furtiva* and the *actio ex lege Aquilia* is under Ulpian's consideration: "namque Aquilia eam aestimationem complectitur, quanti eo anno plurimi fuit, condictio autem ex causa furtiva non egreditur retrorsum iudicii accipiendi tempus." See also D. 45. 1. 59.

semper enim moram fur facere uidetur. (2.) Nouissime dicendum est etiam fructus in hac actione uenire.

9. IDEM libro trigensimo ad edictum. In condictione ex causa furtiua non pro parte quae peruenit, sed in solidum tenemur, dum soli heredes sumus; pro parte autem heres pro ea parte, pro qua heres est, tenetur.

10. IDEM libro trigensimo octauo ad edictum. Siue manifestus fur siue nec manifestus sit, poterit ei condici. ita demum autem manifestus fur condictione tenebitur, si deprehensa non fuerit a domino possessio eius: ceterum nemo furum condictione tenetur, posteaquam dominus possessionem adprehendit. et ideo Iulianus, ut procedat in fure manifesto tractare de condictione, ita proponit furem deprehensum aut occidisse aut fregisse aut effudisse id quod interceperat. (1.) Ei quoque, qui ui bonorum raptorum tenetur, condici posse Iulianus libro uicensimo secundo digestorum significat. (2.) Tamdiu autem condictioni locus erit, donec domini facto dominium eius rei ab eo recedat: et ideo si eam rem alienauerit, condi-

for a thief is always considered to be in default. 2. Lastly, we must rule that fruits too are within the scope of this action.

9. *Ulpian.* In the condiction on the ground of theft we are liable, supposing we are sole heirs, not for the part (of the stolen article) which has come into our hands, but for the whole; but an heir in part is liable for the proportion in which he is heir.

10. *Ulpian.* Whether a man be a *fur manifestus* or a *fur nec manifestus*, a condiction can be brought against him. But a *fur manifestus* will be liable to the condiction, only if his possession has not been wrested from him by the owner; in fact, no thief is liable to the condiction after the owner has recovered possession. And so Julian, as a starting-point for his consideration of the condiction against a *fur manifestus*, makes the assumption that the thief has either killed, or broken or poured away that which he had misappropriated. 1. Julian in the twenty-second book of his *Digests* states that the condiction can also be brought against a man who is liable to the *actio ui bonorum raptorum*. 2. But the condiction is only allowable till such time as, by act of the owner, the ownership of the thing departs from him; and therefore, if he has alienated the thing,

cere non poterit. (3.) Unde Celsus libro duodecimo digestorum scribit, si rem furtiuam dominus pure legauerit furi, heredem ei condicere non posse: sed et si non ipsi furi, sed alii, idem dicendum est cessare condictionem, quia dominium facto testatoris, id est domini, discessit.

11. Paulus libro trigensimo nono ad edictum. Sed nec legatarius condicere potest: ei enim competit condictio, cui res subrepta est, uel heredi eius: sed uindicare rem legatam ab eo potest.

12. Ulpianus libro trigensimo octauo ad edictum. Et ideo eleganter Marcellus definit libro septimo: ait enim: si res mihi subrepta tua remaneat, condices. sed et si dominium non tuo facto amiseris, aeque condices. (1.) In communi igitur re eleganter ait interesse, utrum tu prouocasti communi diuidundo iudicio an prouocatus es, ut, si prouocasti communi

he cannot bring the condiction. 3. Hence, Celsus states in the twelfth book of his *Digests* that if the owner of a stolen thing has bequeathed it absolutely to the thief, his heir cannot bring a condiction against the thief: and even if he has bequeathed it not to the thief, but to some other person, we must say, as before, that the condiction is barred, because the ownership has been parted with by act of the testator, that is, by act of the owner.

11. *Paulus.* Yet neither can the legatee bring the condiction; for the condiction belongs to the man himself from whom the thing has been stolen, or to his heir; but he can by vindication reclaim from the thief the thing legacied.

12. *Ulpian.* And so Marcellus accurately discriminates in his seventh book: for he says, if a thing stolen from me[1] remains yours, you will have the condiction: and even if you have lost the ownership without act of your own, you can in like manner have a condiction. 1. Hence, with regard to an article owned in common, he says, with accuracy, that it makes a difference whether you have demanded a suit *communi divi-*

[1] "Mihi scilicet per quem tu rem possides." Pothier. But I cannot agree with his suggestion that *tibi* ought to be read instead of *mihi*. Ulpian is drawing attention to the fact that although the *actio furti* is given to every person who has interest, the *condictio furtiva* is only granted to the owner and his heir.

diuidundo iudicio, amiseris condictionem, si prouocatus es, retineas. (2.) Neratius libris membranarum Aristonem existimasse refert eum, cui pignori res data sit, incerti condictione acturum, si ea subrepta sit.

13. Paulus libro trigensimo nono ad edictum. Ex argento subrepto pocula facta condici posse Fulcinius ait: ergo in condictione poculorum etiam caelaturae aestimatio fiet, quae impensa furis facta est, quemadmodum si infans subreptus adoleuerit, aestimatio fit adulescentis, quamuis cura et sumptibus furis creuerit.

14. Iulianus libro uicensimo secundo digestorum. Si seruus furtiuus sub condicione legatus fuerit, pendente ea heres condictionem habebit et, si lite contestata condicio exstiterit,

dundo, or whether the suit has been forced upon you: since, if you have demanded the suit, you will lose your condiction; if the suit has been forced upon you, you will retain it[1]. 2. Neratius, in his work the *Membranæ*, states that Aristo was of opinion that a man to whom anything has been given in pledge has a *condictio incerti*, if it has been stolen from him[2].

13. *Paulus.* Fulcinius says that cups made out of stolen silver can be claimed by condiction: hence, in the condiction for the cups account will be taken of the chasing done at the cost of the thief; in like manner as when an infant has been stolen and has grown, the value taken is that of the youth, although he has grown by the care and cost of the thief.

14. *Julian.* If a stolen slave be given as a legacy upon some condition, so long as the condition is in suspense, the heir will have the condiction[3]; and if at the moment of *litis*

[1] He who challenges the suit *communi dividundo* is evidently prepared to give up part-ownership in some of the items of the estate in order to acquire full ownership in the others. Hence, whatever is assigned to his partner, may be considered to have been assigned with his consent: but, as we see in D. 13. 1. 10. 2, voluntary alienation of the thing destroys the condiction. The non-challenger, on the contrary, if this particular article be assigned away from him, loses the ownership, but as the loss is presumably against his will, he does not lose the condiction which accrued to him whilst he was owner.

[2] See also D. 13. 3. 2.

[3] Till the condition vests, the heir is owner: after the condition has vested, the legatee is owner; but, not being a general successor, has no condiction. D. 13. 1. 11: D. 47. 2. 53. 29. It may be said that in this case the heir ought to have the condiction, because the ownership has passed from him

absolutio sequi debebit, perinde ac si idem seruus sub condicione liber esse iussus fuisset et lite contestata condicio exstitisset: nam nec petitoris iam interest hominem recipere et res sine dolo malo furis eius esse desiit. quod si pendente condicione iudicaretur, iudex aestimare debebit, quanti emptorem inuenerit. (1.) Cauere autem ex hac actione petitor ei cum quo agitur non debebit. (2.) Boue subrepto et occiso condictio et bouis et corii et carnis domino competit, scilicet si et corium et caro contrectata fuerint: cornua quoque condicentur. sed si dominus condictione bouis pretium consecutus fuerit et postea aliquid eorum, de quibus supra dictum est, condicet, omnimodo exceptione summouetur. contra si corium condixerit et pretium eius consecutus bouem condicet, offerente fure

contestatio the condition has vested, an acquittal must ensue; just as it would, if the same slave had been ordered to become free upon a condition, which condition had become vested at the time of *litis contestatio;* for the plaintiff has now no interest in the recovery of the slave, and the matter of suit has, without fraud on the part of the thief, ceased to belong to the heir. But if judgment be given during the pendency of the condition, the *judex* must award the sum which he could find a purchaser (ready to give). 1. But the plaintiff will not be under obligation in such a suit to give security to the defendant[1]. 2. When an ox has been stolen and slaughtered, the owner has a condiction for the ox, its hide and its flesh, that is to say, if the hide and flesh have also been appropriated: the horns too can be matter for a condiction. But if the owner in a condiction for the ox has obtained his value, and shall afterwards bring a condiction for any of the things above-named, he will undoubtedly be repelled by an exception. If, on the other hand, he has brought a condiction for the hide and obtained its value, and shall then bring a condiction for the ox, he will be defeated by

otherwise than by his own act, D. 13. 1. 10. 2; but we must remember that the heir is bound, *quasi ex contractu*, by the testator's act, and the legacy is through act on the part of the testator. See Just. *Inst.* 3. 27. 5.

[1] What is awarded to the heir is not the price, or part of the price, of the thing, but the value of his contingent possession: the thief will owe the *whole value* to the legatee, if he does not at once deliver the legacy to him on the vesting of the condition. Hence no return on the part of the heir can possibly be demanded, and therefore no security is needed.

pretium bouis detracto pretio corii doli mali exceptione summouebitur. (3.) Idem iuris est uuis subreptis: nam et mustum et uinacia iure condici possunt.

15. Celsus libro duodecimo digestorum. Quod ab alio seruus subripuit, eius nomine liber furti tenetur: condici autem ei non potest, nisi liber contrectauit.

16. Pomponius libro trigensimo octauo ad Quintum Mucium. Qui furtum admittit uel re commodata uel deposita utendo, condictione quoque ex furtiua causa obstringitur: quae differt ab actione commodati hoc, quod, etiamsi sine dolo malo et culpa eius interierit res, condictione tamen tenetur, cum in commodati actione non facile ultra culpam et in depositi non ultra dolum malum teneatur is, cum quo agetur.

17. Papinianus libro decimo quaestionum. Parui refert ad tollendam condictionem, offeratur seruus furtiuus an in

the exception of fraud, provided the thief tenders the price of the ox with the price of the hide deducted. 3. Such also is the rule when grapes are stolen, for both the juice and the skins[1] can be lawfully claimed by condiction.

15. *Celsus.* What a slave has stolen from a stranger, he is liable for in an *actio furti* on becoming free; but no condiction can be brought against him, unless he has appropriated the thing after becoming free[2].

16. *Pomponius.* He who commits a theft by using an article lent to him or deposited with him is also liable to a condiction on the ground of theft: which condiction differs from the *actio commodati* in this respect, that, even though the article has perished without malice or carelessness on his part, yet he is responsible in the condiction: whereas in the *actio commodati* the defendant is scarcely liable for more than carelessness, nor in the *actio depositi* for more than malice[3].

17. *Papinian.* As to the destruction of the condiction, it matters little whether the stolen slave is tendered or there is a

[1] *Vinacea = reliquiae uuae expressae.* Dirksen.

[2] In actions on delict, *noxa caput sequitur;* but there is no such rule in actions on quasi-contract, such as the *condictio furtiua*.

[3] The MSS. read "cum quo depositi agitur:" but the word *depositi* is clearly superfluous, and therefore we omit it, as suggested by the majority of editors.

aliud nomen aliumque statum obligationis transferatur: nec me mouet, praesens homo fuerit nec ne, cum mora, quae eueniebat ex furto, ueluti quadam delegatione finiatur.

18. SCAEVOLA libro quarto quaestionum. Quoniam furtum fit, cum quis indebitos nummos sciens acceperit, uidendum, si procurator suos nummos soluat, an ipsi furtum fiat. et Pomponius epistularum libro octauo ipsum condicere ait ex causa furtiua: sed et me condicere, si ratum habeam quod indebitum datum sit, sed altera condictione altera tollitur.

19. PAULUS libro tertio ad Neratium. Iulianus ex persona filiae, quae res amouit, dandam in patrem condictionem in peculium respondit.

20. TRYPHONINUS libro quinto decimo disputationum. Licet fur paratus fuerit excipere condictionem et per me steterit, dum in rebus humanis res fuerat, condicere eam, postea autem perempta est, tamen durare condictionem ueteres uolue-

novation into another liability and another cause of obligation. Nor do I care whether the slave was present or not[1], since the delay (in fulfilling a duty) which was consequent on the theft is ended by a sort of delegation.

18. *Scaevola.* Since a theft takes place when any one knowingly receives money which is not due, we must consider in the case where an agent pays his own money, whether the theft is committed upon him. And Pomponius in the eighth book of his *Epistles* says that the agent himself has the condiction on the ground of theft: but that I also have one, if I have ratified the payment which was made without being due. But the one condiction is destroyed by the other.

19. *Paulus.* In the case of a daughter who has removed anything, Julian says that a condiction must be granted against the father to the extent of the *peculium.*

20. *Tryphoninus.* Even though a thief was prepared to defend a condiction, and it was through my fault that the condiction was not brought whilst the thing was in existence, and afterwards it was destroyed, yet the ancients maintained that the condiction could still be brought, because it is considered

[1] Sc. in the case of novation: presence was necessary in the case of oblation. D. 46. 3. 72.

runt, quia uidetur, qui primo inuito domino rem contrectauerit, semper in restituenda ea, quam nec debuit auferre, moram facere.

that any one, who originally misappropriated a thing against the will of its owner, for ever makes default in restoration of what he ought not at all to have removed.

DE CONDICTIONE EX LEGE.

D. 13. 2.

1. Paulus libro secundo ad Plautium. Si obligatio lege noua introducta sit nec cautum eadem lege, quo genere actionis experiamur, ex lege agendum est.

1. *Paulus.* If an obligation has been established by some new enactment, and it has not been provided in the same enactment by what form of action we are to sue, the suit must be "on the law[1]."

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[1] See Introduction, p. xiv, under head (I).

DE CONDICTIONE TRITICARIA.

D. 13. 3.

1. Ulpianus libro uicensimo septimo ad edictum. Qui certam pecuniam numeratam petit, illa actione utitur 'si certum petetur': qui autem alias res, per triticariam condictionem petet. et generaliter dicendum est eas res per hanc actionem peti, si quae sint praeter pecuniam numeratam, siue in pondere siue in mensura constent, siue mobiles sint siue soli. quare fundum quoque per hanc actionem petimus et si uectigalis sit

1. *Ulpian.* He who claims a certain amount of coin employs the action designated "*si certum petatur*": but he who claims other things will sue by the *condictio triticaria.* And it must be stated generally, that by this form of action all things are claimed which are not coin, whether they depend on weight or measure, and whether they are moveable or appertain to the soil. Hence we also claim land by this form of action, even if it be *ager vectigalis*[1], and a right, if any one has stipu-

[1] *Ager vectigalis* is treated of in D. 6. 3, and as that title is exceedingly short, a translation of it is here given: "the lands of cities are in some cases termed *vectigales*, in others not. They are called *vectigales* when leased in perpetuity, that is, on terms that so long as the rent is paid for them, they shall not be taken away either from the actual hirers or their successors. The *non vectigales* are those which are let out for cultivation, as we usually let out our lands to private individuals. When persons have hired land for cultivation in perpetuity, although they do not become owners, yet it is held that they have an action *in rem* against any intruder, and even against the burgesses themselves, provided, that is, that they pay their rent. So also is it if they have hired for a term, and the term of hiring has not expired."

As the tenants are not *domini*, their right is possession only, and in fact, as Savigny points out, "possession," as first recognised, meant a

siue ius stipulatus quis sit, ueluti usum fructum uel seruitutem utrorumque praediorum. (1.) Rem autem suam per hanc actionem nemo petet, nisi ex causis ex quibus potest, ueluti ex causa furtiua uel ui mobili abrepta.

2. IDEM libro octauo decimo ad Sabinum. Sed et ei, qui ui aliquem de fundo deiecit, posse fundum condici Sabinus scribit, et ita et Celsus, sed ita, si dominus sit qui deiectus condicat: ceterum si non sit, possessionem eum condicere Celsus ait.

3. IDEM libro uicensimo septimo ad edictum. In hac actione si quaeratur, res quae petita est cuius temporis aestimationem recipiat, uerius est, quod Seruius ait, condemnationis tempus spectandum: si uero desierit esse in rebus humanis, mortis tempus, sed ἐν πλάτει secundum Celsum erit spectandum: non enim debet nouissimum uitae tempus aestimari, ne ad exiguum pretium aestimatio redigatur in seruo forte morti-

lated for one, as for instance, an usufruct or a servitude over estates rural or urban. 1. But no one can claim his own property by this form of action, except in cases where he is permitted so to do, for example, on the ground of theft or when a moveable has been taken away by force.

2. *Ulpian.* Against him also who has ejected any one by force from land, Sabinus states, there can be a condiction for the land; and so too Celsus, but only in case the ejected person who sues is owner; if, however, he be not owner, Celsus says, he can bring a condiction for the possession.

3. *Ulpian.* In this action, if it be asked at what time the article claimed is to be valued, what Servius says is the more correct rule, viz. that the time of the award is to be regarded: but if it has ceased to exist, the time of its destruction, and yet, according to Celsus, this must be considered liberally; for the last moment of existence ought not to be regarded, lest the valuation should be reduced to a trifling sum, as, for in-

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right analogous to ownership in the *ager publicus*, where the true ownership was vested in the Roman people. It was allowed to continue with the *ager vectigalis*, as the later form of the *ager publicus*. See Savigny, *on Poss.* Bk. 1. § 13: Niebuhr, *Römische Geschichte*, vol. II. pp. 161—170, 2nd edition. Hence the *condictio* applicable to recovery of *ager vectigalis* would be *condictio triticaria incerti*.

fere uulnerato. in utroque autem, si post moram deterior res facta sit, Marcellus scribit libro uicensimo habendam aestimationem, quanto deterior res facta sit: et ideo, si quis post moram seruum eluscatum dederit, nec liberari eum: quare ad tempus morae in his erit reducenda aestimatio.

4. Gaius libro nono ad edictum prouinciale. Si merx aliqua, quae certo die dari debebat, petita sit, ueluti uinum oleum frumentum, tanti litem aestimandam Cassius ait, quanti fuisset eo die, quo dari debuit: si de die nihil conuenit, quanti tunc, cum iudicium acciperetur. idemque iuris in loco esse, ut primum aestimatio sumatur eius loci, quo dari debuit, si de loco nihil conuenit, is locus spectetur, quo peteretur. quod et de ceteris rebus iuris est.

stance, when a slave is mortally wounded. But in either case[1], if the thing has decreased in value after default has been made, Marcellus in his twentieth book says, an estimate must be made of the amount of its depreciation; and so, if any one has given up a slave, who lost an eye after default was made, he is not absolved: wherefore in such cases the valuation must be referred to the time of default[2].

4. *Ulpian.* If any merchandise, which ought to be given on a particular day, is claimed, as wine, oil, corn, Cassius says the amount in issue must be valued according to what it was worth at the date at which it ought to have been given: but, if there was no agreement as to this date, according to its worth at the time when the suit was instituted[3]. And the same must be the rule as to place, so that primarily the value must be taken at the place where it ought to have been given, and if there was no agreement as to the place, that place is regarded where the demand was made. And this is the rule as to other matters also.

[1] Sc. whether the thing is in existence or not.

[2] These rules accord with those given in D. 13. 1. 8. 1 and D. 45. 1. 59, if we bear in mind the maxim stated in D. 13. 1. 20, that a thief is always *in mora*.

[3] Unless the defendant was *in mora*: for then the plaintiff can claim the highest value since the time of default, if that is greater than the value at *litis contestatio*.

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